QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:
From January 1, 1939
Through March 31, 1939
Volume XIV

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act No. 50 House Bill 225 approved February 21, 1939, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from January 1, 1939 through March 31, 1939.

The Act referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Act also provides a copy of said report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in this State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
THOMAS S. LAWSON,
Attorney General.

OPINIONS

December 23, 1938.

Dr. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Contracts for public improvements—

1. An awarding authority having received bids after advertising for the time and in the manner provided for in Section 1 of Act No. 540, General Acts 1935, page 1146, approved September 14, 1935, may reject all bids received if it deems it advisable so to do and may advertise for new bids if it so desires, but there is no requirement of law that it re-advertise before new bids are received.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of December 20, 1938, which follows:

"Section 1 of Act No. 540, General Acts 1935, page 1146, approved September 14, 1935, which is an Act relating to, regulating and requiring a pre-qualification and classification of bidders on public improvements, provides that 'Before entering into any contract for a public improvement, the awarding authority may advertise for bids for two consecutive weeks in a newspaper of general circulation in the county or counties in which the improvement or undertaking, or some part thereof, is to be made; the awarding authority may also advertise in such other publication as it may deem advisable. Such notices shall state that plans and specifications for the improvement are on file in the office of the authority and the time at which the bids therefor will be received.'

"The State Board of Education recently advertised for bids, in compliance with the requirements of said section, for a Science and Health Building to be constructed at the State Teachers College in Montgomery, Alabama, which said project is to be financed by a Federal grant and loan through the Federal Emergency Administration of Public Works of the United States. These bids were opened today and all of them were found to be considerably in excess of the maximum amount which has been allotted through the Federal Emergency Administration of Public Works of the United States for both grant and loan for this purpose. Therefore, the State Board of Education rejected all of said bids as it is given the authority to do so by Section 5 of Act No. 540, supra.

"The State Board of Education is now faced with this situation: The law under which the grant and loan for the erection of this building was made available through the Federal Emergency Administration of Public Works of the United States, provides that actual construction on the project must begin not later than December 31, 1938. Consequently, it is impossible for the State Board of Education to again advertise for bids for two consecutive weeks in a newspaper, etc., in compliance with the provisions of Section 1 of the Act between now and that date. If we are required to again make this advertisement for two weeks before we receive new bids on this project, it means that the grant and loan from the Federal Emergency Administration of Public Works for this building will be lost.

"The premises considered, I respectfully request your opinion as to whether or not the above quoted provisions of Section 1 of Act No. 540 requiring this newspaper advertisement are directory or mandatory. In other words, I desire to know if the State Board of Education, which is the awarding authority in the instant case, may proceed to receive new bids on this project without first advertising for bids for two consecutive weeks in a newspaper before said bids are received, or whether we must first comply with the provisions of that section.

"In this connection, I respectfully refer you to an opinion rendered by you under date of August 30, 1938, to Hon. Ed Pettus, Secretary-Treasurer, State Licensing Board for General Contractors, Montgomery, Alabama, where you held that while an awarding authority was subject to the provisions of the act regulating general contractors, there was no penalty placed upon such an awarding authority for failure to comply with the provisions thereof, and that, consequently the State Licensing Board for General Contractors would have no recourse whatever against an awarding authority if it issued plans or specifications or proposed forms to and accepted bids from a general contractor who had not been licensed by the Board, as provided by the provisions of said act."

You first ask whether or not the provisions of Section 1 of Act No. 540, which is set out in your letter of inquiry, are directory or mandatory, and in the alternative you ask whether or not the State Board of Education, in the situation detailed by you, may proceed to receive new bids without again giving the advertisement provided for by Section 1.

Since the answer to your alternative question will serve to advise you fully in the premises, we shall consider the question of whether or not the provisions of said Section 1 are directory or mandatory, it being unnecessary for us to decide that question here.

As you detail the situation in your letter of inquiry, the State Board of Education advertised for bids, in full compliance with the law, for the construction of a Science and Health Building at the State Teachers College in Montgomery, Alabama, which said project is to be financed by a Federal grant and loan through the Federal Emergency Administration of Public Works of the United States, and when it opened the bids received, upon finding that all of them were considerably in excess of the maximum amount allotted for this project through the Federal Emergency Administration of Public Works of the United States through both grant and loan, it rejected all of the bids received.

It is my opinion that the State Board of Education may now proceed to receive new bids on this project without again advertising for bids in the manner provided for in Section 1 of said act, though it may re-advertised before new bids are received, if it so desires, although you state in your letter of inquiry that because of the time element involved it is not possible to re-advertise for the time provided for in Section 1, supra. This for the reason that Section 5 of said act provides in pertinent part:

"If, in the opinion of the awarding authority, the acceptance of the lowest responsible bid or bids shall not be for the best interests of the State, it shall be lawful for him or it to reject all bids and advertise for others in the manner aforesaid."

It will be noted that this provision merely makes it lawful for the awarding authority to reject all bids received if in its opinion that is for the best interests of the State, and also makes it lawful for him to advertise for other bids in the manner provided for in Section 1 of said act. It does not require that, all bids being rejected, the awarding authority must advertise for other bids before receiving the same.

The premises considered, I advise you that in the instant case the State Board of Education, having received bids on this project after advertising for same for the time and in the manner provided in said Section 1, and having rejected all of the bids received, as it had a right to do, because it deemed that to be for the best interests of the State, may now proceed to receive new bids on this project without again advertising for bids.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 9, 1939.

Hon. C. E. McNatt,
Clerk of the Circuit Court,
Russellville, Alabama.

Costs and Fees—Section 3367, Code of 1923—

Term of sentence for costs, imposed by the Law and Equity Court of Franklin County, having been anticipated by payment of costs to Clerk prior to accounting by State pursuant to section 3667, Code of 1923, it is the duty of the Clerk to remit the costs so collected to the State, but not trial tax.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"John Doe was convicted on a misdemeanor charge in the Law & Equity Court of this county and was fined $50.00 and costs. Judgment was rendered against the defendant for the fine and costs for the use of the county. The defendant having failed to pay the fine and costs was sentenced to twenty days hard labor to pay the fine and to sixty-one days hard labor to pay the costs, said costs amounting to $45.30. The defendant was delivered to the State Board of Administration to work out the fine and costs under a contract with the county. The defendant has served the twenty days hard labor to pay the fine and on the twentieth day of hard labor, the defendant through his friends paid the court costs amounting to $45.30 to the Clerk of the Law & Equity Court. Included

in this bill of costs of $45.30 is an item of $5.00 trial tax provided for in the act creating the Law & Equity Court, which trial tax goes to the county.

"There is a judgment for $45.30 against the defendant in the Law & Equity Court for this costs. Should I apply this $45.30 court costs on this judgment or should I send the $45.30 to the convict department or Board of Administration? If I send the whole $45.30 to the Board of Administration should the Board of Administration send the trial tax back to me? Inasmuch as the Board of Administration has not paid any costs to the clerk of the court or to the county, should I send any of the costs to the Board of Administration, as there was only enough costs collected from defendant to pay all items of costs due on the judgment of conviction?"

The contract of your county with the State Board of Administration is authorized by Act No. 72, General Acts of 1927, p. 53 (Section 3), pursuant to the terms of which the State is required to pay the county the fees prescribed by section 3667, Code of 1923, upon conviction and delivery of the prisoner to the penitentiary officials. Quarterly Reports of the Attorney General, Vol. 7, p. 168. No fees are payable until delivery.

Section 3667, supra, requires the costs therein set forth to be paid out of the convict fund "whenever a defendant is convicted and sentenced to the penitentiary ***." The delivery of the prisoner to the penitentiary officials invokes the mandates of this section.

Once the mandates of Section 3667, supra, are invoked, it is my opinion that the State becomes entitled to all costs. **Opinions of the Attorney General, 1928-30, p. 537; Quarterly Reports of the Attorney General, Vol. 6, p. 19.**

The rights of the State to the costs would not be extinguished by reason of the payment of the costs prior to an accounting by the State as required by section 3667, supra. The State became responsible for the fees on delivery of the prisoner, and that responsibility did not cease when the costs were paid. The costs which you collected belonged to the State.

The trial tax which you collected is not a part of the costs, but is revenue. It should not be remitted. **Quarterly Reports of the Attorney General, Vol. 6, p. 19.**

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 9, 1939.

Hon. F. T. Flowers, Secretary,
Board of Plumbers,
Route 2, Box 24-A,
Mobile, Alabama.

Plumbers—Licenses—Mobile County—

Acquiring of state and county licenses alone does not permit persons to engage in business as plumbers in Mobile County.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter in which you request my opinion as follows:

"Would you be kind enough to give us an opinion as to the act regulating the business and trade of plumbers in all counties in this State having a population of One Hundred Thousand or more. This bill has been amended to read Eighty Thousand, which takes in Mobile County.

"Will you please advise whether it will be legal for plumbers taking out State and County licenses, where they are not qualified with the Board of Plumbers, and have not stood the plumbers examination, to operate in this County. We have some plumbers in this County that have not stood the examination but merely take out the state and county licenses.

"Are plumbers legally qualified to do plumbing in Mobile County where they have not stood the examination?"

In reply I wsh to advise you that in my opinion your question should be answered in the negative.

I wish to refer you to the General Acts of 1935, page 1002, Section 12, which provides as follows:

"Section 12. It shall be unlawful for any person to do or perform, or to contract, direct or superintend any plumbing done within any incorporated town, village, city in any such county in the State of Alabama unless regularly licensed to do as provided by this Act."

I wish to further call your attention to Section 11 of the above-cited Act. which provides for the said examination as follows:

"Section 11. Each and every applicant for registration and license as a master plumber shall be examined by the Board as to his knowledge and skill in supervising, controlling, doing or performing plumbing in a sufficient number of questions to thoroughly test his knowledge and fitness to be registered and licensed as a master plumber. Each and every applicant for registration and license as a journeyman plumber shall be

examined by the Board in a sufficient number of questions to thoroughly test his knowledge and fitness to do practical plumbing work, and in addition thereto, the Board may require such applicant as journeyman plumber to do and perform such actual practical physical tests as shall be deemed by the board expedient. Said examination, both as to the questions and answers, shall be as far as practicable, be in writing; but should it become apparent to the Board that injustice would be done any particular applicant as a journeyman plumber to require him to answer the questions in writing, the Board may submit the questions to such applicant orally, and his answers thereto may also be oral. The Examinations the Board shall prescribe shall be of a uniform, fair and impartial nature, so as to test the knowledge, skill and ability of each applicant for registration and license."

In my judgment, the acquiring of State and County licenses alone does not permit one to engage in the business of plumbing in Mobile County.

I wish to call your attention to Section 14½ of the above quoted act which is self-explanatory and reads as follows:

"Section 14½. The provisions of this Act shall not apply to counties of this State having a population of less than 80,000, according to the last or any subsequent Federal Census."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 9, 1939.

Brigadier General John C. Coleman,
The Adjutant General,
Capitol.

National Guard—

Appropriations made for military purposes by General Acts, 1931, p. 402, as amended by General Acts, Extra Session, 1932, p. 298, may be expended for the purchase of furniture and equipment for the use of the National Guard organization there dealt with.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Your opinion is immediately requested as to whether or not the money appropriated under Act No. 347, General Acts 1931, page 402, as

amended by Senate Bill No. 261, Acts, Extra Session, 1932, page 298, can be applied on the purchase of furniture for the 106th Observation Squadron, Alabama National Guard."

Section 7 of Acts 1931, page 402, (Act No. 347) provides:

"Said Commission shall be and it is hereby authorized and empowered to construct, or cause to be constructed, **and equipped,** upon said tract of land, a hangar, administration building and such other buildings and housing facilities as such Commission may deem necessary or convenient for the use and instruction of the air service of the Alabama National Guard and for the storage, care, preservation and operation of the equipment of such air service. Said Commission shall also have power and authority to improve said tract of land with all improvements and facilities, in addition to said buildings, as it may deem necessary or expedient for the convenient use of said air service."

Under the broad powers conferred upon the Commission by the legislative Act, supra, the appropriations therein provided for may be expended for the purchase of furniture and equipment for the buildings therein listed. Of course, no part of the appropriation can be expended without the approval of the Governor.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 14, 1939.

Mrs. Marie Bankhead Owen, Member,
Alabama Pension Commission,
Capitol.

Pensions—

The expenses of preparation of report of State Pensions required by Section 2942 of the Code of Alabama, 1923, may be paid from the Miscellaneous Fund provided in Section XV of General Acts of Alabama, 1935, page 792.

Opinion by the Attorney General.

Dear Mrs. Owen:

I have your request for opinion as follows:

"Under Section 2942, Code of Alabama, 1923, the law requires a report to be made to the Governor under the direction of the Alabama Pension Commission quadrennially from November 1, 1922.

"As a member of the Pension Commission and on conferring with the State Auditor in whose office are kept all the rolls and files and records of matters pertaining to the operation of the Alabama Pension Commission with regard to pensions paid to Confederate Soldiers and to the widows of Confederate Soldiers, it was deemed advisable to employ a person who was familiar with all these pension matters to prepare the quadrennial report required by law.

"It is considered that the provisions of the law as set forth in Chapter 55, Article 1, Code of Alabama, 1923, fully warranted the employment and compensation of such person. Your attention is called particularly to Section 2954, Code of Alabama, 1923, also to an Act of the Legislature, approved September 6, 1935, (The General Appropriation Bill page 799, General Acts of Alabama, 1935, and the particular appropriation made to the Pension Commission and denominated as Miscellaneous—$300.00, and to the general provision 'that the expenses of the Pension Commission shall be paid from the Pension Fund;' and also to an Act of the Legislature, approved September 14, 1935, page 975, Section 20, which recognizes and reaffirms all the provisions of Article 1, Chapter 55, Code of Alabama, 1923, with reference to Confederate pensions 'and **other charges** against said fund set out in Article 1, Chapter 55, Code of Alabama, 1923;' and to other subsequent acts of the Legislature which amended the Old Age Pension Law and each of which acts recognizes and reaffirms all the provisions of Article 1, Chapter 55, Code of Alabama, 1923.

"Please advise whether or not the employment had of a person to prepare said quadrennial report and the payment or compensation therefor is authorized by law, such work being performed by such person outside of the clerical duties required of him by law and being an extra work done and performed outside of office hours and without interference with his clerical duties. I will state that the report has been fully prepared conforming in all respects to the detailed requirements of law and meets with my approval as a member of the Alabama Pension Commission."

You attached thereto and enclosed an affidavit of the party who prepared the quadrennial pension report that the work done on such report was performed outside of the duties required of him as clerk in the State Auditor's Office and such work was done at times other than those at which he was required by law to perform such duties as such clerk.

Section 2934 of the Code of Alabama, 1923, provides that the State Auditor shall appoint a secretary to the Alabama Pension Commission and details his duties. There is not included, in my opinion, in such duties the preparation of the report of State Pensions required by Section 2942 of the Code of Alabama, 1923.

Section 2942 provides for the preparation and submission of a quadrennial report of the operations of the State Pension Law, etc. to be prepared under the direction of the Alabama Pension Commission. This Section does not designate who shall prepare this report.

Sub-section 2 of Section XV of the Appropriations Act of 1935, General Acts of Alabama, 1935, page 792, 799, provides a Miscellaneous Fund of $300.00 to be used by the Pension Commission as it deems meet and proper. It is my opinion that this sum may be properly used for the payment of the expenses of preparing and submitting the report as required by Section 2942, supra, the

Pension Commission having, in my judgment, the right to employ whomsoever it deems proper to prepare such report and to pay them from this Fund.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

January 21, 1939.

Dr. A. H. Collins,
Superintendent of Education,
Montgomery, Alabama.

State Board of Education may legally delegate to an Executive Committee thereof or to the State Superintendent of Education the authority to pre-qualify the contractors under Act No. 540 (General Acts, 1935, p. 1146).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 20, 1938, in which you request my opinion as follows:

"Will the provisions of Act No. 540, approved September 14, 1935, be met if contractors are pre-qualified by the Executive Committee of the State Board of Education or the Superintendent of Education when said Executive Committee or Superintendent of Education is authorized to do so by the State Board of Education?"

In my opinion, the provisions of the act relating to and requiring a pre-qualification and classification of bidders on public improvements (Act No. 540, General Acts, 1935, p. 1146) will be sufficiently complied with if the contractors are pre-qualified by the Executive Committee of the State Board of Education or the Superintendent of Education when said Executive Committee or Superintendent of Education is authorized to do so by the State Board of Education.

Under provisions of Act No. 540, supra, the term "awarding authority" is defined to include "all the state agencies of the State of Alabama." The State Board of Education is an agency of the State of Alabama.

The question now arises as to the authority of the State Board of Education to legally delegate to an Executive Committee of such Board or to the State Superintendent of Education the authority to pre-qualify contractors thus provided by Act No. 540, supra.

Section 7 of the School Code of 1927 provides as follows:

"7. Supervision of Public Schools of State.—The supervision of the public schools of the State shall be vested in the State Superintendent of Education, with the advice and counsel of a State Board of Education, and their powers and compensation shall be fixed by law."

Section 35 defines the general powers of the State Board of Education and provides that they shall be exercised as follows:

"35. State Board of Education, General Powers of.—The State Board of Education shall exercise, **through the State Superintendent of Education** and his professional assistants, **general control and supervision over the public schools of the State,** except the University of Alabama, the Alabama Polytechnic Institute, and the Alabama College, and shall consult with and advise through its executive officer and his professional assistants, county boards of education, city and town boards of education, superintendents of schools, school trustees, attendance officers, principals, teachers, supervisors, and interested citizens, and shall seek in every way to direct and develop public sentiment in support of public education." (Emphasis supplied)

The reason for the insertion of the provision underlined in Section 35, supra, is readily understood when we note that by Section 33 of the School Code the State Board of Education is required to hold only an annual meeting. While it is true that other meetings may be held, it is a matter of record that the Board meets only two or three times a year at most. This is due partially to the fact that the Board is composed of members who are necessarily selected, under provisions of Section 26 of School Code, from the several Congressional Districts of the State, and, therefore, their respective homes are many miles distant from the places where meetings of the Board may be held.

In my opinion, the language of Sections 7 and 35 of the School Code quoted, supra, expressly authorize the State Board of Education to delegate to a Committee of the Board or to the State Superintendent of Education both ministerial and judicial powers and functions. The use of the words "general control and supervision over the public schools of the State" to my mind clearly evidences an intention on the part of the Legislature to give the State Board of Education authority to delegate any and all duties incident to the operation, maintenance and management of the public school system of the State in addition to those duties of a scholastic nature.

The State Superintendent of Education in order to effectively exercise "general control and supervision over the public schools of the State" must perform duties of both a judicial and an administrative nature. The very act here under consideration requires the performance of duties by an educational agency of the State of Alabama within time limits which absolutely destroys the possibility of that performance by a Board which meets only once a year. The Legislature, realizing that from time to time duties would be exacted of the Board of Education that would be impossible of performance unless the said Board delegated authority to either a Committee of the Board or to the State Department of Education to act in matters of a judicial as well as ministerial nature, inserted the provision in Section 35 that the State Board of Education should act "through the State Superintendent of Education."

You are therefore advised that the State Board of Education has authority to delegate the power in question and that, having such power and having

consummated such delegation thereof, the State Superintendent of Education or the Executive Committee of the Board may lawfully act as directed. Cf. Opinion to Hon. Richard C. Foster, President, University, Alabama, under date of July 19, 1938. Also opinion found in Quarterly Report of Attorney General, Vol. VI, page 24.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Insane Paupers—

1. County governing body authorized, under Section 2798 of the Code of Alabama, 1923, to adopt a reasonable schedule of fees to be paid any officer or person duly authorized, who temporarily cares for and maintains an allegedly insane pauper, pending an investigation into the mental status of such allegedly insane pauper before the judge of probate of the county.

2. County governing body not authorized under Section 1445, Code of Alabama, 1923, to adopt a reasonable schedule of fees for the purpose of reimbursing an officer or person who conveys an insane pauper to the insane hospital, for all necessary expenses incurred in so conveying said person to said hospital. Section 1445, supra, provides for all necessary expenses in such case.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of August 3, 1938, which reads as follows:

"Please refer to Sections 1445 and 2798, Code of Alabama 1923, and advise me as follows:

"If a County governing body adopts a schedule of fees for care, etc., of insane paupers as follows:

"'That any officer or person who temporarily cares for and maintains any insane pauper shall be allowed fees or compensation for such services as follows:

" 'For temporary care ..... $.....
" 'For Feeding (per day) ..... $.....

"would such fees be a legal charge against the County under Section 2798?

"If a County governing body allows, for use of automobile by an officer or person, ... cents per mile traveled, together with hotel bill and meals for himself and insane pauper, and $..... per day, together with hotel bill and meals for services of person or persons duly ordered to assist him, in conveying an insane pauper to the Insane Hospital, would such an allowance be a legal charge against the County under Section 1445?"

In my opinion, your first inquiry should be answered in the affirmative.

Section 2798, Code of Alabama, 1923, reads as follows:

"Section 2798. COMPENSATION TO PERSONS CARING FOR INSANE PAUPERS.—The court of county commissioners and county boards of revenue shall provide a schedule of fees in their respective counties, to be paid out of the county treasury on their order, to the county officers, or any person duly deputized by such officers, to temporarily provide for the care and maintenance of any person alleged to be insane, when such person has no means of paying such expense, pending an investigation into the mental status of such alleged insane pauper, before the probate judge of such county. Such judge shall, at the same time, hear evidence and decide therefrom the question of the ability of such alleged insane pauper to pay such expenses."

This section is direct authority for a county governing body to adopt a schedule of fees, such as the one outlined in your inquiry, provided, of course, that the schedule is reasonable, to be paid to an officer or person duly deputized, who temporarily provides for the care and maintenance of any person alleged to be insane, when such person has no means of paying such expenses pending an investigation into the mental status of such person, before the judge of probate of such county. Maintenance, as used in said section, necessarily includes feeding. Cf. Opinion to Hon. J. P. Williams, Sheriff, Barbour County, under date of July 20, 1936, Quarterly Report of Attorney General, Vol. IV, p. 65.

In answer to your second inquiry, it is my opinion that Section 1445, Code of Alabama, 1923, does not authorize the county governing body to adopt a schedule of fees as above set forth. Said section provides as follows:

"Section 1445. CONVEYING PATIENT TO HOSPITAL.—The judge of probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital and all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury on order from the county commissioners."

It will be noted that said section provides only for the payment of all necessary expenses in such case. In other words, each case should stand on its own footing, and all necessary expenses are paid accordingly.—**Quarterly Report of Attorney General, Vol. VII, p. 246; Biennial Report of Attorney General, 1926-1928, p. 319.** This is the only section of which I am cognizant authorizing the payment of expenses in such cases.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 21, 1939.

Hon. Page S. Bunker,
State Forester,
State Commission of Forestry,
Montgomery, Alabama.

Alabama State Commission of Forestry is authorized to enter into an agreement with the United States for forestry work on Federal Lands owned in connection with the Pea River Project.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

This is to acknowledge your letter of recent date enclosing copy of a proposed agreement between the State of Alabama, acting through the State Commission of Forestry, and the United States of America, acting by and through the Secretary of Agriculture, pursuant to Title III of the Bankhead-Jones Farm Tenant Act. This agreement purports to be a license granted to the State of Alabama to utilize lands owned by the Federal Government in connection with the Pea River Project, (LA-AL 10). The uses include the practice of forestry, recreation, grazing and the preservation of wild life. There is no financial liability incurred by the State of Alabama.

In my opinion the State Commission of Forestry is authorized to enter into such an agreement under authority of Section 989, Code of Alabama, 1923, as amended by Act No. 161, General Acts of 1936-1937, p. 183. This section, in laying down very broad principles and aims for the State Forestry Commission, constitutes the Commission the sole cooperating agency with the Federal Government, and specifically authorized it to "enter into agreements with the Federal Government or other agencies for acquiring by lease, purchase or otherwise such lands as in its judgment are desirable for State Forests or State Parks or Parkways."

Therefore, if the State Forestry Commission considers the land in question "desirable for State Forests or State Parks or Parkways," it is my opinion that the Commission is authorized to enter into the agreement enclosed in your letter.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 21, 1939.

Hon. Joe Patton,
Tax Collector,
Sumter County,
Livingston, Alabama.

Tax Collectors—

Tax Collectors are required to collect the ad valorem taxes on motor vehicles due all incorporated municipalities of more than 100

inhabitants by virtue of Schedule 158.12 (d) of Section 348 of the Revenue Act of 1935.

The commission for doing same is set out in said Schedule 158.12 (d).

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge receipt of your letter of September 14, 1938, which is as follows:

"With reference to Attorney General's opinion found on page 247 of report of 1924-26, under date of October 3rd., 1925, in regard to the collection of auto tax for cities, municipalities, etc., please advise me if I would be right in refusing to collect tax due **towns,** with less than 2,000 inhabitants on **automobiles** which have not passed ordinance required by Section 3095 of Code of 1923? Also am I required to collect auto tax for all municipalities in Sumter County, (None have a population of as much as 2,000), if I am required to collect same, what commission shall I pay the assessor for the assessing, and what commission may I retain for myself?

"For the reason that this collection must begin on October 1st, next and the time very limited in which to be posted about it I will greatly appreciate your giving this your immediate attention."

It is my opinion that you cannot refuse to collect taxes on automobiles due towns, with less than 2,000 inhabitants which have not passed an ordinance required by Section 3095 of the Code of Alabama, 1923.

I refer you to Schedule 158.12 (d) of Section 348 of the Revenue Act of 1935, which provides as follows:

"(d). The tax assessors and tax collectors of the several counties in this State, in addition to assessing and collecting the ad valorem taxes due the State and counties on motor vehicles, **shall collect the ad valorem taxes on motor vehicles due all cities in this State.** The tax collector shall report and pay over the money collected for said cities at the same time and in the same manner as State and county taxes are reported and paid over by him. Said assessors and collectors shall each receive a commission of two and one-half per cent (2½%) of the amount of city taxes collected; and the tax collectors shall deduct said commission from the amount collected before paying into the City Treasury, and at the same time pay over to the tax assessor commissions due him under this Act. The judge of probate shall not issue a license to operate a motor vehicle on the highways of this State until all ad valorem taxes due the said State, counties and cities are paid for the preceding year as shown by a receipt of the tax collector."

You will note that the above quoted schedule precisely states that the **tax collectors shall collect the ad valorem taxes on motor vehicles due all cities in this state..**

Section 3095 of the Code of Alabama, 1923, is incorporated in its entirety in the Alabama Revenue Laws, 1935, as Section 201. This is a general statute providing that any municipal corporation may, by ordinance duly adopted, avail itself of all the machinery provided for the assessment, equalization collection and enforcement of such collection of State and county taxes in the assessment and collection of its taxes.

Special provisions relating to specific subjects control general provisions relating to general subjects. The things specially treated will be considered as exceptions to the general provisions. **Herring v. Griffin,** 211 Ala. 225, 100 So. 202. Since Schedule 158.12 (d) of Section 348 of the Revenue Act of 1935 is a special statute dealing specifically with the collection of ad valorem taxes on motor vehicles, it is controlling so far as that phase of the tax system is concerned.

This office has held that the word **cities** as used in Schedule 158.12 (d), supra, includes all incorporated municipalities, both cities and towns as classified in Section 1734 of the Code of Alabama, 1923, viz., cities contain 2,000 or more inhabitants and towns more than 100 and less than 2,000 inhabitants. **Quarterly Reports Attorney General,** Vol. 12, page 65.

Therefore, it is my conclusion that it is incumbent upon you as tax collector to collect the ad valorem taxes on motor vehicles due all incorporated municipalities of more than 100 inhabitants in Sumter County, provided, of course, that said munipical corporations have levied such a tax.

In answer to your second question as to what commission the assessor and collector are entitled for assessing and collecting said tax, I wish to refer you to Schedule 158.12(d) of Section 348 of the Revenue Act of 1935, which provides as follows:

> "Said assessors and collectors shall each receive a commission of two and one-half per cent (2½%) of the amount of city taxes collected; and the tax collectors shall deduct said commission from the amount collected before paying into the city treasury, and at the same time pay over to the tax assessor commissions due him under this Act."

The opinion referred to in your letter has been superceded by the enactment of Schedule 158.12(d) of Section 348 of the Revenue Act of 1935.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939.

County Board of Education,
Shelby County,
Columbiana, Alabama.

County Board of Education—Authority to contribute to municipal sewerage project—

1. Municipal corporation has no authority to levy a special assessment against public school property for local sewerage improvement.

2. County Board of Education legally may contribute to cost of municipality sewerage project to the extent of said project's worth and value to public school property by affording sanitary facilities thereto.

3. County Board of Education may contract with municipal corporation to pay reasonable rental of sanitary facilities furnished to public school property by the municipality.

Opinion by Assistant Attorney General Rowe.

Gentlemen:

I have your request for opinion as follows:

"Your opinion is requested in reference to sewer assessments made by the Town of Columbiana against High School and Public School property, title to which is in the State.

"About ten years ago the municipality installed a sewer system and assessed the cost of the improvement against the property abutting, as provided by law. An assessment was made against the High School and Public School properties, owned by the State.

"The County Board of Education is willing to pay the High School and Public School assessments in the form of sewer rentals or sewer connections, but, before making payment, desires your opinion as to whether or not the expenditure would be legal. It is suggested that the municipality could withhold the right and regulate the right of sewer connections; and that it was within its authority in requiring the school authorities to pay for connection to the State property in lieu of assessments."

Because of the terms in which your inquiry is posed, I am unable to give you an unequivocal answer.

The courts have held that a County Board of Education, being a creature of statute, is limited strictly to the powers expressly granted and those necessarily implied; and that before it is warranted in making an expenditure of school funds, it must point to a "thus saith the law," which authorizes the same. **Woodruff v. Beeland,** 220 Ala. 652.

Section 99 of the Alabama School Code of 1927 provides:

"99. Sanitary Water Closets Required.—The County Board of Education shall provide sanitary, hygienic, suitable and convenient water closets or out-houses for the children of the public schools under its jurisdiction, not less than two for each school or building when both sexes are in attendance, with separate means of access to each. It shall be the duty of said Boards to make provisions for keeping the said water closets or outhouses in a clean, comfortable, sanitary and hygienic condition."

This provision not only authorizes the County Board of Education to install sanitary facilities in public school buildings under its jurisdiction, but imposes upon said Board the absolute duty of providing such facilities where it is practicable. Cf. **County Board of Education v. Cements Products Co.,** 209 Ala. 310.

Of course, municipal corporations are not authorized to fix special assessments against public school property to pay the cost of construction of local improvements. Cf. **Biennial Report of Attorney General, 1928-30,** pp. 192, 318; **City of Huntsville v. Madison County,** 166 Ala. 389; **Town of Eutaw v. Coleman,** 164 Ala. 165; **Smith v. Franklin County,** 221 Ala. 136. The reasoning in **Eutaw v. Coleman,** supra, has been adopted by the legislature by the enactment of Acts, 1931, pages 612-13.

The County Board of Education cannot circumvent this limitation upon municipal authority by acquiescing in the assessment without reference to the value of the project to the school property. There is no magic in denominating the assessment a "sewer rental" as a "sewer connection charge." What the County Board of Education cannot do directly, it cannot do by circumvention, indirection or subterfuge.

However, there appears no reason why the County Board of Education, in the execution of the authority conferred upon it and in compliance with the injunction imposed upon it by Section 99 of the School Code,, supra, may not cooperate with the municipality by joining in a municipal sewerage project which will result in furnishing the necessary sanitary facilities to the public school property, under the jurisdiction of such Board. Cf. Quarterly Report, Vol. V, page 122.

In the concurring opinion of Mr. Chief Justice Anderson in **Eutaw v. Coleman,** supra, it is said:

> "I base my conclusion solely upon the theory that the pavement in question was a betterment or improvement of the county property, being upon the border thereof and tending to beautify same, make it perhaps more accessible, as well as comfortable, to the occupants of the courthouse by preventing to some extent mud in winter and dust in summer. The fact that a municipal street was thereby improved was but an incident to the improvement of the courthouse square and its borders or immediate surroundings, so far as the county was concerned, and while the county had no right to control the municipal street, yet, if the town was willing for it to enter upon the street or cooperate with it, the county had the authority to do so if it was for the purpose of improving or benefitting the county property, although by doing so it might or did improve the municipal highway. Suppose the property surrounding the courthouse was not a street, but belonged to an individual, in whole or in part, and was in such a condition as to mar the beauty of the courthouse and grounds, or interfere with the approach thereto, or cause it to be flooded during a wet season, could not the county remedy the defects, with the consent of the owner, although by doing so the said adjoining property would be benefited? I think so. Could it be questioned that the county could drain or sewer its lot even if the pipes or curbing were placed on the lands of another, in whole or in part, with the consent of the owner, even though it also benefitted the property upon which said improvements encroached? I think not. Could not the county inclose and improve the borders of its property by a wall or fence and place the same over its line,

in whole or in part, with the consent of the attingent owner, although it also benefitted the property upon which the improvements encroached? I think so. It may be that paving the streets in question was primarily the improvement of the municipal highway, so far as the town is concerned, but, as to the county, it was but an improvement of its property, and the fact that it also operated to improve the streets was a mere incident to the betterment of the property. If the county could make such improvements alone, there is no sound reason why it could not cooperate with the adjoining owner in doing something mutually beneficial."

In my opinion the reasoning of the quoted excerpt is direct authority for the conclusion here announced.

It must be kept in mind that the amount of the assessment fixed by the municipal authorities against the public property, in the proceedings for the local improvement, is not the criterion by which the amount of the contribution of school funds to the cost thereof is to be determined. The fact that the municipal assessment is fixed at a certain amount does not mean necessarily that the improvement is of that worth or value to the public school property. In my opinion, the County Board of Education may determine, and agree with the municipality upon, what is the reasonable value of the sanitary facilities afforded to the public school property by the municipal sewerage improvement project and may contribute not exceeding that sum to the municipality for the purpose of aiding in the payment of the costs of the same, either by lump sum payment or by contract to pay the same in installments. It is further my opinion that, if it suggests itself to the County Board of Education that rental of said facilities, rather than the payment of part of the costs of the project, is advantageous, the said Board may contract with the municipality to pay a reasonable annual rental for the service afforded thereby.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 21, 1939.

Hon. John C. Curry, Chairman,
State Tax Commission,
Capitol.

Licenses—Chain Stores—A stand operated in the lobby of a theater, access to which is gained only by the purchase of a ticket of admission to such theater, and at which stand there may be purchased confections, such as candy, chewing gum, etc., is liable for store license.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of recent date, which is as follows:

"Your opinion is desired as to whether or not there is included within the definition of the term 'store', as hereinabove set out, a stand operated in the lobby of a theater, access to which is gained only by the purchase of a ticket of admission to such theater, and at which stand there may be purchased confections, such as candy, chewing gum, etc.

"It has come to our attention that a certain operator has placed these stands in various theaters throughout the State of Alabama, and we are not advised whether this party should be charged a license for the operation of a series of chain stores based on the number of such stands so placed or whether there is any license whatsoever prescribed in the revenue laws for such an operation.

"We will thank you therefore to advise us at your earliest convenience as to the liability vel non of such a stand for license."

I am of the opinion that the stand as described in your inquiry is liable for a store license. Such a stand, in my judgment, falls within the provisions of Article XIII, Chapter 3, Section 348 (Schedules 155-155.10) of the Revenue Act of 1935. Said article pertains to store licenses. Schedule 155.7, as amended by Act No. 99, H. 72, approved February 18, 1937, (General Acts 1936-1937, p. 111) provides in part as follows:

"Schedule 155.7. The term 'store' as used in this Schedule shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained, controlled or for which the buying is done by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold, either at retail or at wholesale. ***"

The Supreme Court of the United States construing a provision almost identical with the above in the case of **Fox v. Standard Oil Company, 294** U. S. 87, 79 L. Ed. 786, stated as follows:

"First. The filling stations and distribution plants are stores or mercantile establishments within the meaning of the statute.

"By Section 8, 'the term "store" as used in this act shall be construed to mean and include any store or stores or any merchantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership, or association either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale.'

"There is no doubt that goods, wares and merchandise of a kind, i. e., gasoline and other petroleum products, and even tires and other automobile accessories, are sold by the complainant and its agencies at its plants and service stations. This satisfies the test of the statute, and subjects the seller to the tax. We are told that the average man if requested to point out to a stranger the store nearest by or even the nearest mercantile establishment would not be likely to think of a filling station as within the range of the inquiry. Wadhams Oil Co. v. State, 210 Wis. 448, 245 N. W. 646, 649, also 246 N. W. 687. There might be force if this suggestion of the statute had left the meaning of its terms to the

test of popular understanding. Instead, it has attempted to secure precision and certainty by rejecting a test so fluid and indeterminate and supplying its own glossary. The goods offered for sale are to be understood as having reference to goods 'of any kind,' and the place at which the sale is made shall include not only places that in the common speech of men would be designated as stores, but, broadly speaking, any mercantile establishment, whether a store or something else. In such circumstances definition by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the law-makers with instructions to apply it to the exclusion of all others. Cf. Midwestern Petroleum Corp. v. State Tax Comrs. 206 Ind. 688, 187 N. E. 882. There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves."

It will be seen from the above that the definition by an average man or even by an ordinary dictionary is not to be substituted for the definition set out by the lawmakers. Our definition of a "store" is all inclusive. It embraces an establishment in which goods, wares or merchandise of any kind are sold regardless of whether or not same may be considered a store by the average man or by ordinary dictionary definitions. The stand, as described in your inquiry, clearly falls within the definition of "store" as used in our statute.

The fact that the stand is not accessible to the public generally, and is accessible only to those who purchase tickets of admission to the theater, does not alter the above conclusion. This office in an opinion rendered to the Judge of Probate of Russell County on October 10, 1935, (Quarterly Report of Attorney General, Vol. I, p. 87) held that a lumber concern operating a commissary in connection therewith is liable for store license on such commissary. In that case the commissary did not sell to the general public. That situation is analogous to the instant case in regard to the general admissibility of the public to an establishment selling goods, wares or merchandise of any kind.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939.

Hon. D. Hardy Riddle,
Judge of Probate,
Talladega County,
Talladega, Alabama.

Motor Vehicle—License Inspector—

(1) A person delinquent in purchasing an automobile tag has a reasonable time to comply with a citation on the part of the license inspector or other lawful officer before being proceeded against criminally in the absence of an existing emergency.

(2) A Highway Patrolman is a lawful officer within the meaning of paragraph "G" of Section 353 of Simon's Revenue Code and may make citations and arrests for violations of the Revenue Code.

(3) A non-resident truck owner who operates his truck for hire in Alabama even for a period of less than thirty days is not exempt from buying a tag and meeting all other requirements concerning the purchasing of said tag.

(4) a. A citizen of Alabama who purchases a tag in season but fails to attach or display said tag in accordance with Schedule 158.1 as amended by Act No. 67, H. 21, Acts, Extra Session, 1936-37, is not subject to pay the penalty prescribed by the Revenue Code.

b. Such owner, however, may be held to answer a criminal charge for willful failure to place said tag in accordance with the above-mentioned schedule as amended.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Reference is made to your letter of November 22, 1938, which I quote as follows:

"Under Sections 3344, 3346 and 3338 of the Code of 1928 and Sections 352 and 353 (pages 443-444) of Simons Revenue Code, please give me an official ruling on the following questions:

"1. Is the procedure prescribed in Section 353 page 443 of Simons Code against persons who are delinquent in purchasing automobile tags exclusive, or, can a person delinquent in purchasing an automobile tag be proceeded against criminally without giving him a chance to first pay the penalties provided under said section without a criminal prosecution where an emergency does not exist?

"2. Does a Highway Patrolman operate under the laws pertaining to the License Inspector in making citations and arrests for using old automobile tags or other violations of the Revenue Code, or are there any separate powers given to such Highway Patrolman that are not provided for the License Inspector?

"3. When a non-resident truck owner operates his truck under contract or for hire in Alabama for a period of less than thirty days, can he be required (a) to buy a tag, (b) to pay 15% penalty and citation fees, (c) can he be proceeded against criminally?

"4. If a citizen of the State purchases a tag in season and fails for a day or two to place the tag, or rather, to display the tag as provided by law, but immediately does place the tag after being warned by an officer, can such owner be charged with the penalty prescribed by the Revenue Code? (b) Can such owner be held to answer a criminal charge?"

(1) It is my opinion that a person delinquent in purchasing an automobile tag, who has been cited, cannot be proceeded against criminally without first giving him the chance to comply with the citation unless an emergency exist. Section 3346 of the 1928 Code provides:

> "If any person shall fail or refuse to take out motor vehicle license as required by law, **after being duly cited** to show cause by the license inspector, the license inspector shall institute or cause to be instituted criminal proceedings against such delinquent before any court having jurisdiction of such offense. In case of emergency the license inspector must commence the criminal proceedings in the first place."

Section 3346, supra, provides that the license inspector may institute criminal proceedings against a delinquent person who fails to purchase an automobile tag **after** he has been warned or cited by the license inspector to so purchase. I am of the opinion, however, that the delinquent owner would not be subjected to criminal prosecution should he immediately purchase an automobile tag **after** being cited to do so by the license inspector, **if no emergency exist.** (See paragraph "B" of Section 353, Simon's Revenue Code of 1936.)

(2) It is my opinion that a Highway Patrolman may, if authorized by the Governor, serve citations and make arrests for violations of the Revenue Code. Paragraph "G" of Section 353 of the Simon's Revenue Laws provides in part as follows:

> "All citations to delinquents shall be served by any **lawful officer,** or by the license inspector, or his deputy who shall be allowed as a fee One Dollar and Fifty Cents ($1.50) for each citation served, to be taxed against the delinquent."

Section 11 of the Highway Patrol Act (General Acts, 1935, pages 756, et seq.) provides that Highway Patrolmen "when so authorized in writing by the Governor, shall have the power of peace officers in the state."

(3) It is my opinion that a non-resident truck owner who operates his truck under contract or **for hire** in Alabama, regardless of the number of days, is required to buy a tag and if he fails to do so within the time prescribed by law he should be subject to pay the 15% penalty and citation fee as prescribed and should he fail to do so after being duly cited by the license inspector he would be subject to criminal prosecution. Schedule 158.15 of the Revenue Bill of 1935 (as amended) Acts, Extra Session 1936-37, page 208:

> "The provisions of the foregoing sections relative to registration and display of registration numbers shall apply to a motor vehicle owned by a non-resident of this State and not used **for hire** in this State, provided that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or Federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon, and shall conspicuously display his registration number as required thereby, provided further that nothing herein shall be construed to permit the uses of motor vehicles **for hire** or for **commercial purposes** by non-residents without complying with the provisions of this Act."

This section, supra, clearly states that non-resident owners of motor vehicles who use same **for hire** or **commercial purposes** are subject to the license schedule concerning the purchase of automobile and truck tags the same as resident owners.

This office has held that "motor vehicles used by visitors in this State, or passing through this State" would be exempt from the license schedule concerning the purchase of automobile tags etc. but "if a visitor sojourning in this State lets his motor vehicle for hire in this State he, of course, is no longer entitled to exemption." (See Opinion to the State Tax Commission, September 28, 1929 in Biennial Report of Attorney General, 1928-1930, page 639.)

(4) It is my opinion that a citizen of the State who purchases a tag in season and fails for a day or two to place the tag or display the tag as provided by law, but immediately does place the tag after being warned by an officer would not be subjected to a penalty prescribed by the Revenue Code. The penalty, as prescribed by the Revenue Code, is imposed upon those owners who fail to purchase their automobile tag in season. In this particular case, the owner has purchased his automobile tag in season and, therefore, would not be subjected to the 15% penalty as prescribed in the Revenue Code.

It is my opinion, however, that such owner could be held to answer a criminal charge should he willfully refuse to comply with Schedule 158.1 as amended by Act No. 67, H. 21, Acts, Extra Session, 1936-37. This provides in part as follows:

> "*** before any private automobile *** shall be used on any public highway the proper license tag therefor must be procured and securely attached to the rear and front end of the automobile ***, said tag to be securely attached right side up with the numbers thereof in an upright position and the numbers thereof plainly visible."

Section "B" of Schedule 158.13 of the Simon's Revenue Code provides:

> "It shall be a misdemeanor punishable by a fine of not less than ($10.00) Ten Dollars and not exceeding Twenty-five Dollars ($25.00) for each offense, to display the tag in any other place or in any other manner as herein provided."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939.

Dr. J. N. Baker,
State Health Officer,
Capitol.

Under provisions, Section 8 of the Act of the Legislature, General and Local Acts of Alabama, Extra Session 1936-1937, county and

municipal governing bodies may be required by legal means of mandamus, to provide a suitable enclosure for the impounding of all dogs found running at large in violation of the provisions of the Act, provided there are sufficient funds with which to discharge the duty of providing such enclosure.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of September 27, 1938, which follows:

"Section 8 of Act No. 200, approved March 2, 1937, makes it a duty of each and every County in the State and of every municipality over 5,000, in which the county pound is not located, to provide a suitable enclosure for the impounding of all dogs found running at large in violation of the provisions of the Act.

"If there is non-compliance by a county or a municipality are there legal means through which compliance may be brought to pass?"

In my opinion, there is a legal means by which the governing bodies of counties and municipalities of the State may be required to perform their duty, as provided in Section 8 of the Act of the Legislature, General and Local Acts of Alabama, Extra Session, 1936-1937, page 232; the legal means being that of petition for writ of mandamus requiring the performance of such duty.

In a similar case, involving the tick eradication law, (General Acts, 1919) the Supreme Court of Alabama in the case of **Hagan et al vs. State, ex rel Batchelor,** 92 So. 600, stated as follows:

"The County bodies, boards of revenue, or commissioners, are left no discretion as to the imposition or suspension of that system of laws in their respective counties, it being the duty of such bodies 'to make adequate appropriations or provision to execute in good faith' laws that define the system, prescribe the measures and means to be taken, and impose the functions upon the boards, officers, and agents described in the law. *** The absence of sufficient funds with which to discharge the duties thus enjoined upon the boards or courts of county commissioners is a consideration that would excuse the discharge of those duties to the extent only that such funds were not available; but to excuse, entirely or pro tanto, the duty's performance, because of lack of funds, this matter of defense must be appropriately asserted and supported. State ex rel v. Board, etc., 180 Ala. 489, 498, 61 South. 368; 26 Cyc. pp. 319, 320; 13 Ency. Pl. & Pr. p. 730. This excuse or defense must not, however, be created by an arbitrary or capricious exercise of the board's discretion and powers in the management and control of the county's other functions and activities."

Accordingly, in connection with your inquiry, a lack of sufficient funds, in the case of counties or municipalities, with which to discharge the duties imposed upon them by said Section 8 would excuse the discharge of such duty, unless such lack of funds be due to an arbitrary or capricious exercise of discretion and powers of such governing bodies in the management and control

of other functions and activities of such counties or municipalities, but, if sufficient funds are available, performance of the duty may be enforced by mandamus.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939.

Hon. Elmer L. Vinson,
Tax Collector,
Limestone County,
Athens, Alabama.

Tax Collectors—The time for filing the bond of duly elected county Tax Collectors is on or before the 15th day of September next after the election, as provided by General Acts of Alabama, 1935, page 754, Act No. 328.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge your letter of November 28, 1938, which is as follows:

"According to Section 2607 of the Code of Alabama, county officials should file their official bonds within forty days after being declared elected; and Section 154 of House Bill 324 says that the tax collector should file his bond in the office of the Probate Judge and also in the office of the State Comptroller on or before the first day of September next after his election. Does this Section 154 apply to our next term of office? I know it applied to our present term, but I am undecided about whether to file my bond within forty days after being declared elected or whether to wait until just before September 1.

"When were we declared elected? I know we were elected November 8, and I suppose that the official count would determine the time when we were declared elected. Even if Section 154 does not apply to the next term, would it be all right to file our bond now as it says on or before September 1 next after our election? Would it make any difference about filing before our next governor is inaugurated?

In answer to your first question, it is my opinion that Act No. 328, General Acts of Alabama, 1935, page 764, is applicable to your next term of office, and accordingly, the time for filing the bond of the county tax collector is on or before the fifteenth day of September next after his election.

This conclusion is founded on an opinion rendered by this office to the State Auditor, November 22, 1930, appearing in Biennial Report Attorney General, 1930-32. This opinion states as follows:

"*** The time and place of the filing of the bond of tax assessor is governed by Section 3038 of the Code of Alabama, 1923, and the time and place of filing the bond of the tax collector, is governed by Section 3046 of said Code.

"These sections of the Code of 1923 take priority over and modify Section 2605 of the Code of 1923. The provisions of Section 2605 of said Code was enacted many years prior to the enactment of the provisions of Sections 3038 and 3046 of said Code.

"The provision of Section 2605 of the Code that applied before the approval of the Revenue Act 1919, (Acts 1919, p. 282 et seq.) on September 15, 1919, to the time of filing the bonds of tax assessors and tax collectors, was repealed by implication, by the provisions of Section 35 and 182 of said Act."

Section 154 of House Bill 324, General Acts of Alabama, 1935, is equivalent for all intents and purposes to Section 3046 of the Code of Alabama, 1923. However, on August 28, 1935, the Legislature enacted Act No. 328, General Acts of Alabama, page 754, which is as follows:

"Section 1. That the time within which the tax collectors of the several counties of Alabama may file their official bonds in the office of the Comptroller be and the same hereby is extended so that said bonds may be thus filed on or before the 15th day of September next after their election. The provisions of this Act shall apply to such tax collectors who were elected during the year 1934 and subsequent thereto.

"Section 2. All laws and parts of laws in conflict with this act are hereby repealed.

"Section 3. This act shall be effective immediately upon its approval by the Governor.

"Approved August 28, 1935."

Section 154 of House Bill 324, General Acts of Alabama, 1935, was approved July 10, 1935, and was to go into effect on October 1, 1935. Act No. 328, General Acts of Alabama, page 754, was approved August 28, 1935, and became effective immediately. The question then arises, which of said Acts the Legislature intended to be controlling in regard to the phase embodied in this latter Act.

It is a general rule of the law that where two statutes are passed at the same session of the Legislature upon the identical subject matter, and are irreconcilably inconsistent, the act passed later, but going into effect earlier, will prevail over the one passed earlier, but going into effect later. 59 **Corpus Juris 1055; Newbauer v. State,** 161 N. E. 826, **People ex rel Davis v. Wabash Ry. Co.,** 114 N. E. 552; **Lewis' Sutherland Statutory Construction,** Volume I, p. 542. The Legislature is deemed to know of the acts passed during the same session, and where two acts are in conflict, the latter repeals the former where there is no reasonable field of operation for both, or if the language of the latter clearly shows the legislative intention of repeal. **Wallace v. Ball,** 205 Ala. 623; 88 So. 442; **Crow v. Gen. Cable Corp.,** 223 Ala. 611, 137 So. 657.

Therefore, said Act No. 328 will prevail over Section 154 of House Bill 324 and repeals said Section 154 so far as the time for filing bonds of tax collectors is concerned, and is controlling.

In answer to your second inquiry, I wish to refer you to Section 511, Code of Alabama, 1923, which prescribes that immediately after ascertaining the result of an election, the board of supervisors must make in writing a public declaration of the result. Said declaration is conclusive evidence of the result of an election and the right to hold office. **Carnley v. Moore,** 214 Ala. 114, 106 So. 604.

Since Act No. 328, General Acts of Alabama, 1935, page 754, states that the bond must be filed **on or before** the fifteenth day of September next after the election, it is my conclusion that it may be filed on any day prior to September 16th. It is immaterial whether the bond is filed before or after the inauguration of the Governor.

I respectfully call your attention to the fact that Act No. 328, supra, only extended the time for the filing of the bond of the tax collector. The bond of the tax assessor must still be filed on or before September first next after election. See Section 20 of the 1935 Revenue Act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939

Hon. C. H. Milford,
Sheriff, Chambers County,
LaFayette, Alabama.

Each county is chargeable with necessary expenses incident to transporting its indigent insane patients from the County Jail to State Hospitals for the Insane.

Opinion by Assistant Attorney General Small.

Dear Sir:

This will acknowledge receipt of your letter of November 17, 1938, in which you request my opinion as follows:

"Please advise me whether the cost of transfer of a prisoner charged with a misdemeanor to Bryce Hospital should be charged to the State or whether it should be charged to the County. That is where an insane is not peaceful and dangerous and a warrant is taken charging with 'Vagrant'.

"In other words a person who is insane and has not committed any felony but is just an insane and was put in jail on a warrant charging 'Vagrant' in order to have a warrant for committal to jail to wait for the proper papers to be submitted to hospital for their approval.

"Please advise whether the State or County should pay the cost of this transfer of prisoner from the county jail to the Bryce Hospital."

In response to your inquiry, you are advised that each county in the State is chargeable with necessary expenses incident to transporting its indigent patients from the county jail to the State hospitals for the insane, after they have first been adjudged insane, or of such mental deficiency as to require incarceration in such hospitals, by the Probate Judge in the county of their residence.

At the time the patient is adjudged insane, the Probate Judge is charged with the duty of ascertaining the financial status of such patient, and those found to be able to pay their own expenses, are, of course, required to do so, in which cases the county would not be required to transport them free of charge, as in indigent or destitute cases.

Section 1445 of the Code of Alabama of 1923, which governs in such cases, reads as follows:

"Conveying patient to hospital.—The Judge of Probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital and all necessary expenses incurred shall be paid out of the county treasury on order from the county commissioners."

Under the facts detailed in your letter of inquiry, it seems that Section 1445, supra, governs this situation and not Section 4577 of the Code of Alabama of 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

(1) Where a defendant has been bound over to the action of the grand jury on a felony charge and is in jail, and the grand jury returns an indictment against him for the charge for which he was placed in jail and at the same time two other indictments, each charging a felony, no capias should issue for his arrest in the original case but should issue and be placed in the hands of the sheriff in the other cases which the grand jury returned.

(2) Where Section 3278, Code of Alabama, 1923, says "in actual custody," this means in actual custody for the offense for which he was originally placed in jail and not for capias not contemplated in the original arrest but was returned by the grand jury at the same time he was indicted for the original offense.

(3) The sheriff would be entitled to his fee for making this arrest in the cases which were returned by the grand jury which are independent of the case for which the defendant was originally incarcerated.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 29, 1938, in which you request my opinion as follows:

"A sheriff has a person in a jail for Grand Larceny under Mittimus from a Magistrate to await the action of the Grand Jury, such person having failed to make bond. The Grand Jury returns an indictment on the Grand Larceny charge and also indicts such person for Burglary and Assault to Murder.

"Please refer to Sections 3278-3288 inclusive and 3741 Code of Alabama, 1923, and amendments to such Sections, the above statement of facts and advise me as follows:

"1. As the person is already in jail charged with Grand Larceny, should the Circuit Clerk issue a writ of arrest for the offense of Burglary and a writ of arrest for the offense of Assault to Murder?

"2. In the event your answer is in the negative, how would the jailer be notified to hold such person on the two additional indictments if such person made bond in the Grand Larceny case?

"3. In the event your answer is in the negative, how would such person officially know that he had been indicted for the two additional offenses?

"4. Are the words 'Actual Custody' as used in Section 3278 applicable only to the offense for which the person is being held pending the action of the Grand Jury?

"5. In the event the Clerk should issue writs of arrest for the charge of Burglary and Assault to Murder, would the Sheriff be entitled to a fee for executing such writ?"

Answering your first request, I am of the opinion that where a defendant is in jail charged with a specific offense, held on a mittimus, and the grand jury returns an indictment against him for this offense and no other, then in this event there is no need for a writ of arrest as the defendant is held

by virtue of the indictment under Section 3278, Code of Alabama, 1923, as amended by an Act approved July 23, 1931, unless it is ordered by the judge presiding when the indictment is found. Said amended section is as follows:

> "That Section 3278 of the Code of Alabama, 1923, be and the same is hereby amended to read as follows: 3278. Writ of arrest Issued by the Clerk, Solicitor or Judge. A writ of arrest must be issued by the clerk forthwith after the finding of the indictment against each defendent who is not in actual custody, or who has not been bailed, or whose undertaking of bail has been declared forfeited, or when an order is made by the judge presiding when the indictment is returned by the Grand Jury, commanding that writ of arrest issue; or it may be issued without order of court, either in term time or in vacation, by the solicitor of the circuit, or by any circuit judge. But if the defendant is in actual custody, he shall be held by virtue of the indictment, and no writ of arrest need be issued unless it is so ordered by the judge presiding when the indictment is found."

Now, on the other hand, if the defendant is held in jail on a charge to await the action of the grand jury as in this case, and the grand jury not only indicts him for grand larceny but returns two other indictments, one for burglary and one for assault with intent to murder, then it would be the clerk's duty to issue a **capias** for each of the other offenses, to wit, burglary and assault with intent to murder, and the sheriff should execute these at once and make his return as in other cases for without this the cases could never be placed on the docket for trial. In other words, without this return the clerk could not have any record or legal notice that the defendant was in custody.—**Biennial Report of Attorney General, 1930-1932, p. 116.**

In answering your first request, I have answered your second and third.

My answer to your fourth request is in the affirmative. The expression "actual custody," as used in Section 3278, as amended, supra, means, in my opinion, actual custody for the offense for which the indictment was returned, the offense in the original case, and does not refer to any other offense charged by the grand jury. As stated above, there must be some legal way of getting the case for which he was indicted, which is independent of the case for which he was originally put in jail, before the court for trial, and there is no other way except as I have detailed in my answer to your first request.

My answer to your fifth request is in the affirmative. I think it is clear from what I have said above that it is the clerk's duty to issue capiases in the two cases of burglary and assault with intent to murder. Then it is the sheriff's duty to serve these even though the defendant is being held in jail on another indictment. If the sheriff is required to serve these warrants, then it follows he would be entitled to pay for same.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939

Hon. B. P. Singleton,
State Comptroller,
Capitol.

1. The cost of seizures provided for in prohibition cases by Section 4654, Code of Alabama, 1923, applies only when a conviction is had and in such instances cannot be paid out of the fine and forfeiture fund of the county.

2. Section 4768 as amended by Act approved September 2, 1935 (General Acts, 1935, p. 727) provides under a search warrant and prohibited liquors are seized but the officer fails to arrest any person in possession of same no fees or mileage or allowance shall be paid to anyone for services under this article, but does provide where a warrant is issued to any peace officer acting under the laws of this State to search a designated place for prohibited liquors and beverages, and such officer executes said warrant, seizes such prohibited liquors or beverages and makes an arrest at the time of said seizure, and said persons are acquitted or the case is nol prossed by such court or withdrawn and filed, or where the parties are arrested in possession of such liquors or beverages and are "finally convicted," then in the last two instances above the costs are paid as in criminal prosecutions upon the court, judge or justice making an order to that effect. This being true, such costs may be paid out of the fine and forfeiture fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 23, 1938, in which you request my opinion as follows:

"Please refer to Sections 4654, 4704 and 4768 and amendment at page 727 of the Acts of 1935 and also A. G. O. page 30 of the Biennial Report for 1932-34 and give your opinion whether seizure fees and mileage may be paid from the Fine and Forfeiture Fund in State failed cases."

As to Section 4654, Code of Alabama, 1923, this section provides for the payment of seizure fee only on conviction, and, in such instances cannot be taxed against or payable out of the fine and forfeiture fund of the county for the reason it does not come under the provisions of Section 4039, Code of Alabama, 1923, as amended by an Act approved February 18, 1927, (General Acts, 1927, p. 45). This section deals with and points out what costs are paid out of the fine and forfeiture fund of the county.

I call your attention to an opinion of this office written August 10, 1929, to the Sheriff of Pike County, Biennial Report of Attorney General, 1928-1930, p. 655, which deals with Section 4654, supra. I find it necessary here to call attention to an error in this opinion which appears in the last paragraph. The error makes the writer say paid out of the "general fund"

when it should say "fine and forfeiture fund." This opinion also fails to call attention to the fact that Section 4654, supra, was amended by the Act of the Legislature of 1927.

I notice you call attention to Section 4704, Code of Alabama, 1923. This section has no connection or bearing on the matter here inquired about. It is true Section 4768, Code of Alabama, 1923, says: "There shall be allowed the officer making the seizure under a search warrant the sum allowed by Section 4704." This is evidently a typographical error in the Code, as we find that Section 4704, supra, deals with penalties which are enforceable against railroads, express companies or other carriers or persons for the illegal transportation of prohibited liquors and does not deal with costs in any manner.

This brings us to the discussion of Section 4768, Code of Alabama, 1923, as amended by an Act approved September 2, 1935, General Acts, 1935, page 727. This section is dealing with seizure fees where the officers make such seizure under search warrant. In order to properly discuss this section so as to make its meaning clear, we find it necessary to divide it into subsections or parts. The first part of this section is as follows:

> "ALLOWANCE FOR OFFICERS ATTENDING AND PROSECUTING CONDEMNATION PROCEEDINGS; HOW TAXED AND PAID.—There shall be allowed the officer making the seizure under a search warrant the sum of three dollars, and also the sum of two dollars additional for every day that such officer shall necessarily be employed in attending court for the purpose of causing liquors seized to be condemned, and the sum of ten cents per mile for each mile he shall travel in executing the writ, together with such reasonable sum as the court may deem just for necessary expenses incurred in transporting and providing storage for liquors and vessels seized; provided, however, that where a warrant is issued to any peace officer acting under the laws of the State of Alabama to search a designated place for prohibited liquors and beverages, and such officer executes such warrant and seizes such liquors or beverages, but fails to arrest any person or persons for having such prohibited liquors or beverages in his or their possession, then no fees, mileage or allowances shall be paid to any one for any service under this article; * * *"

You will note the above quoted part of said section provides that where an officer makes a search under the above provision and seizes prohibited liquors or beverages but fails to make an arrest for having such prohibited liquors or beverages in possession, there is no fee, mileage or allowance allowed or paid to anyone for services for seizure under this article or subsection. I see no reason for further comment on this division of this section as its provisions are plain that no fee or allowance can be paid for this service.

Now we come to the second division of this section, which is as follows:

> "Provided, further, that where a warrant is issued to any peace officer acting under the laws of the State of Alabama to search a designated place for prohibited liquors or beverages, and such officer executes said warrant, seizes such prohibited liquors or beverages, ar-

rests one or more persons alleged to have had the possession of such liquors or beverages at the time of said seizure, and said person is tried and acquitted of the charge or charges arising out of the possession, use, or sale or said seized prohibited liquors or beverages by the Court having jurisdiction of the cause, or the cause is nol prossed by such court or withdrawn and filed, then the fees, mileage or allowances above named shall be taxed and paid as in criminal prosecutions in which the State fails, upon the Court, or Judge, or Justice making an order to that effect, * * *"

If the search is made under search warrant which calls for searching of a designated place for prohibited liquors or beverages and an arrest is made, and on the trial the defendant or defendants are acquitted or the case is nol prossed or withdrawn and filed, the fees and mileage or allowance above-named shall be taxed and paid as in criminal prosecutions in which the State fails, provided the court or judge trying the case makes an order to that effect. Therefore, it is our opinion that these fees may be payable out of the fine and forfeiture fund of the county, under the provisions of Section 4039, Code of Alabama, 1923, as amended by an Act approved February 18, 1927, General Acts, 1927, page 45, which section, as amended, deals with claims for fees payable out of the fine and forfeiture fund of the county. In order for these fees to be paid out of this fund, the provisions of Section 4039, supra, as amended, must be strictly followed.

We come now to the last provisions of Section 4768, Code of Alabama, 1923, supra, as amended, which are as follows:

"If, however, the arrest of one or more persons alleged to have had the possession of such liquors or beverages be made and the defendant or defendants finally convicted, the costs or fees hereinabove set out shall be taxed in the bill of costs against such defendant, or defendants, and if not collected from such defendant or defendants, so convicted shall be taxed and paid as in criminal prosecutions in which the State fails, upon the Court, or Judge or Justice making an order to that effect."

The above subsection of Section 4768, supra, simply means that where the defendant or defendants are convicted and a judgment is rendered for costs and execution has been returned against such defendant or defendants marked "no property found," this cost may be paid out of the fine and forfeiture fund of the county, according to the provisions of Section 4039, supra, as amended. This can be paid only when the court or judge trying the case makes an order according to the provisions of subsection quoted above.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939.

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

Health — State Department of Public Health — County Board of Health.

A County Board of Health does not have the authority to incur expenses for laboratory services performed by a city hospital in performance of its duties relative to public health.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"The Board of Health of one of our counties has asked this office to request an opinion from you as to the legality of payment to its City Hospital for laboratory services incurred by said Board of Health in doing public health work.

"Section 1055 of the Code of 1923, as amended by the 1935 Legislature (General Acts, Regular Session, 1935, page 928), provides that 'the County Health Officer . . . . shall employ for his assistants, subject to the approval of the County Board of Health, such number of physicians, nurses, clerks and other employees as are found necessary to accomplish the work.' This would seem to imply that recipients of public funds set apart for county health work would have to be the nominees of the County Health Officer, and that it would not be legal to allocate any part of such funds to the hospital administration.

"It may be added also that at the point in question a public health laboratory is being maintained out of State and local funds, which laboratory is at present equipped to perform all laboratory tests of a public health nature. It may be further added that in the development of the laboratory services throughout the State effort has been made, with a view to conserving health department funds, to avoid any duplication of services.

"In the light of the foregoing, your opinion is respectfully sought on the question set forth in the first paragraph of this communication."

It is my opinion that the County Board of Health mentioned in your inquiry does not have the authority to make payment to a city hospital for laboratory services incurred by the County Board of Health in doing public health work. As you state, Section 1055 of the Code of Alabama, provides in part as follows:

"He shall, (referring to the County Health Officer) under the direction of the State Health Officer and the County Board of Health,

have sole direction of all sanitary and public health work within the county, including incorporated municipalities, and shall employ for his assistants, subject to the approval of the County Board of Health, such number of physicians, nurses, clerks, inspectors, and other employees as are further necessary to accomplish the work."

It is my interpretation of this section that the County Health Officer with the approval of the County Board of Health may employ under the authority of this section assistants for the carrying out of his duties in public health work within the county, but, there is no authority under this section for the County Health Officer to employ the aid of a hospital laboratory.

Further, Section 1052 of the Code of Alabama sets forth the authority and jurisdiction of County Boards of Health. Nowhere in this section is there any authortiy either express or implied for a County Board of Health to incur any expenses for public health work by employing the services of a city hospital laboratory or private laboratory. The power of the County Board of Health and the County Health Officer to expend funds of the county must be sought in the statutes and as this office has held in an opinion found in Quarterly Report of Attorney General, Vol. IX, p. 35, that:

"The policy long adopted in this State is that a county can incur no liability, make no contracts, nor do any act, regardless of the benefits that might be derived thereby, unless the power to do so is derived either from an express authorization of the law, or by necessary implication."

Further, you advise me that the state maintains a public health laboratory using for this purpose state and local funds; and further that this laboratory is equipped to perform all laboratory tests of a public health nature. Further, the state contributes a certain portion of the funds used to operate the County Health Unit.

It is therefore my conclusion that an expenditure by the County Board of Health for laboratory services performed by a city hospital would be a duplication of the service that the State Department of Public Health is prepared to perform and further there is no direct authority nor any necessary implication in the public health statutes of the State of Alabama for the above expenditure.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939.

Hon. J. H. Green, Clerk,
Circuit Court,
Decatur, Alabama.

Fees — In a capital case, where it has become necessary that the sheriff summon a special jury more than once, he would be entitled to be paid out of the convict fund, $3.00 for each time such special jury is summoned.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have before me your recent request for my opinion as follows:

"In a capital case, where the sheriff has summoned a special jury more than once, would he be entitled to $3.00 for each time a special jury is summoned?"

This question should be answered in the affirmative. The language of the statute is plain and unambiguous as we see it. The very first item listed in Section 3667 of the Criminal Code 1923, of cost to be paid out of the convict fund, whenever a defendant is convicted, and sentenced to the penitentiary, is as follows: "For issuing each capias or warrant (once), fifty cents." In the same section the item pertinent to your inquiry says: "For summoning jury in capital cases, three dollars."

It is our opinion that had the Legislature intended that this item should only be paid once, although it might have become necessary to summon a special jury in some case more than once, that they would have been just as careful to insert the word "once" after this last item of cost as they were after the first item above referred to.

We are further persuaded that this same question is fully dealt with and answered in keeping with this opinion, in the opinion written to Hon. S. M. Cobb, Clerk of Wilcox County on August 17, 1937, and found in the Opinions of Attorney General for the period from July 1, 1937, through September 30, 1937, at page 150, part 5 of the questions there answered.

We do not find where this question has ever been decided by our Courts, and we think the opinion of this office heretofore rendered is correct, and that in any capital case, if it should become necessary for the Sheriff to summon a special jury more than once, that he would be entitled to be paid $3.00 as a part of the cost for each time such special jury is summoned.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 21, 1939.

Hon. Walter B. Jones, Commissioner,
Department of Conservation,
Capitol.

Conservation, Department of — Oysters — Riparian rights.

1. An upland owner of land with riparian rights, may lease or authorize other parties to gather oysters from his privately planted reef fronting on his property for a distance of 600 yards.

2. No person may catch oysters with an instrument other than oyster tongs except for the purpose of transplanting and cultivating reefs when a dredge may be used upon the express permission and order of the Alabama Oyster Commission.

3. A person who gathers oysters either from a public or private reef for the purpose of resale, canning, processing or shipping, is subject to the licensing provisions of General Acts 1936-37, p. 192.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"I would appreciate it if you will advise me with reference to riparian rights and the gathering of oysters.

"1. Can an upland owner fronting on the water, with riparian rights, lease, or authorize other parties to gather oysters fronting on his property for a distance of 600 yards, or in any way assign his rights.

"2. If such upland owner can do so, can the party who gets such authorization, use a dredge to gather these oysters without first procuring a license for dredging? Also, can he gather oysters by tongs without a license."

Your first inquiry must be answered in the affirmative. Section 2724. Code of Alabama, 1923, provides in part as follows:

"All the beds and bottoms of the rivers, bayous, lagoons, lakes, bays, sounds and inlets within the jurisdiction of the State of Alabama are the property of the State of Alabama, to be held in trust for the people thereof, **but the owners of land fronting on such waters, where oysters may be grown, shall have the right to plant and gather same in the waters in front of their land, to the distance of six hundred yards from the shore.** * * * " (Italics ours).

It will be noted that although all beds and bottoms of rivers and other bodies of water are made the property of the State of Alabama by the

above-quoted section, yet, certain rights are given to riparian owners. Further, General Acts 1936-37, p. 192, does not change the effect of Section 2724 of the Code, supra. Section 2 of the 1936-37 Act provides in part as follows:

> "All sea foods existing or living in said waters **not held in private ownership legally acquired,** and all beds and bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds and inlets bordering on or connecting with the Gulf of Mexico, or Mississippi Sound, * * * including all oysters and other shellfish and parts thereof, grown thereon, either naturally or cultivated, shall be, continue and remain the property of the State of Alabama, * * * ." (Italics ours).

It will be noted therefore that the above-quoted section recognizes the right of property in oysters planted on privately owned reefs. Further, the Supreme Court of Alabama in the case of **Cleveland & Wife, vs. Alba,** 155 Ala. 468, had under consideration, Section 3155 of the Code of 1896, from which Section 2724 of the Code of 1923, above-quoted, was derived. The court in that case stated:

> "It is clear, under the law, that ownership of the property fronting the water in which the oysters are planted, and opposite to said beds, is essential to the right to gather the oysters. It is equally clear that, after the owner plants, **he would have such a right in the oysters as would be the subject of transfer or assignment, or which would enable** his personal representative or heir to gather and market in case of his death." (Italics ours).

The right given by Section 2724 of the Code to riparian owners to plant and gather oysters in the waters in front of their land has been recognized as a species of property to which the incidents of ownership attach (Havard vs. State, 220 Ala. 359) and which may be assigned or transferred. (Cleveland & Wife vs. State, supra).

It is therefore my conclusion that an upland owner who has riparian rights may lease or authorize other parties to gather oysters from the beds that he planted as limited by Section 2724, above-quoted.

In reference to your second inquiry, the general rule is that the mode in which the right of fishing shall be exercised may be subjected to statutory regulation in order to protect the rights of the public in the preservation and propagation of fish. (Tiffany on Real Property, Vol. I, p. 1039). This regulation extends to both public and private waters. We have two sections of the Code that make it an offense to take oysters with instruments other than oyster tongs. These are Sections 5103 and 5111 of the Code of Alabama, 1923, which provide as follows:

> "Section 5103. TAKING OYSTERS WITH CERTAIN INSTRUMENTS PROHIBITED; PRESUMPTIVE EVIDENCE OF GUILT. — It is not lawful to take or catch oysters in any of the waters of this state with or by a scoop, drag, or **dredge,** or by the use of any other instrument than the double rake or oyster tongs operated by hand by the use of either handles or ropes, operated by hand power. All persons violating the provisions of this section shall forfeit fifty dollars, to be recovered in the mode hereinafter prescribed, and also forfeit to the

state the boat or vessel employed in such unlawful business, her tackle, apparel, and furniture; and the finding on board the boat or vessel of rake, scoop, or other instrument forbidden by this section is presumptive evidence of guilt." (Italics ours).

"Section 5111. CATCHING OYSTERS OTHERWISE THAN WITH TONGS. — Any person who takes or catches oysters by using any implement or instrument other than the oyster tongs heretofore generally used for that purpose is guilty of a misdemeanor."

Pursuant to these sections no person whether on public or private waters may use a dredge in taking oysters. But, by General Acts of 1936-37, p. 192, Section 11 thereof permits the dredging of oysters by order of the Oyster Commission for the purpose of cultivating, transplanting and spreading oysters and shells. Every such dredge used must be licensed by the Alabama Oyster Commission and a fee of $25.00 paid. (Section 21, General Acts, 1936-37, supra.)

It is my conclusion therefore that oysters may be taken from a private reef only by the use of oyster tongs, unless they are to be used as provided by Section 11, General Acts 1936-37, p. 196. Then, and only in that event, when licensed by the Alabama Oyster Commission, a dredge may be used.

In reference to your inquiry as to the licensing provisions referring to gathering of oysters from private reefs by oyster tongs, it is my opinion that the licensing provisions of General Acts 1936-37, p. 192, apply to this situation. For example, Section 17 (supra) provides that each shipper of raw oysters shall pay a tax of Fifteen Dollars and shall receive from the commission a license therefor. It is my opinion that this section applies to one who has taken oysters from a private reef and cans or ships the same. Further, Section 18 (supra) provides in part as follows:

"On all oysters taken, caught or removed from any **of the public or private reefs,** beds or bottoms of this state, there shall be imposed and collected the following tax:— Three (3c) cents for every barrel of oysters and in addition thereto twenty-five percent of all oyster shells so removed from all reefs, * * * ." (Italics ours).

Further, Section 24 imposes a license tax of Fifty Dollars on all persons or firms engaged in the business of packing, canning or processing oysters. In my opinion this section also applies to taking of oysters from a private reef. Further, Section 25, General Acts, 1936-37, (supra) provides a license tax of Five Dollars on any person or firm engaging in the business or operation of a raw oyster house or engaging in the sale of raw oysters. This licensing provision also applies to the taking of oysters from a private reef.

Further, the licensing provision of Section 27 (supra) may or may not apply to the situation as the facts show.

It is therefore my conclusion that a person taking oysters from a private reef by means of oyster tongs is subject to the licensing provisions contained in General Acts 1936-37, p. 192.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939.

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Sheriffs — Coroner's Jury — Fees —

The duty to summon coroner's jury is upon the coroner and the compensation provided therefor by Section 3751 of the Code of 1923 accrues to the coroner. There is no provision of law for the compensation of a sheriff for services in connection with the summoning of a coroner's jury.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The Sheriff has filed a claim with the Board of Revenue for $5.00 for summoning a Coroner's Jury and claims that he is entitled to compensation under Section 7287 of the Code for 'Summoning a jury for and inquisition in the County or under a writ of ad quod damnum or dower and attending on such jury, and taking inquest, per day when no other provision is made by law, $5.00.'

"I refused payment on the ground that summoning a jury for an inquest is an authority of the coroner for which a fee is provided. The Sheriff states that he issued them although the coroner was present and, I understand, requested him to do so. The coroner was present at the inquest, took the jurors' report, the doctor's statement and made a report of same.

"Please advise if the sheriff is entitled to $5.00 as a fee for summoning this jury of six men."

In my opinion, your inquiry must be answered in the negative.

The compensation for the summoning of a jury for holding a coroner's inquest is provided by Section 3751 of the Code of 1923. It provides, in the part here pertinent:

"3751. Coroner's Fees. — The coroner is entitled to the following fees:

"For summoning jury on inquest..... $1.00."

This is the only provision for the allowance of a fee for the summoning of a coroner's jury. The sheriff is not entitled to compensation under Section 7287 nor under any other provision of law for summoning a coroner's jury. The fact that the coroner directed or requested the sheriff to summon the jury is immaterial.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 21, 1939.

Mr. Joseph E. Easterling, Treasurer,
Chilton County,
Clanton, Alabama.

County Treasurer —

Section 303 of the 1928 Code of Alabama imposes a nondelegable duty upon county treasurer to receive and disburse county funds according to law.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Reference is made to your letter of inquiry which I quote as follows:

"I, as County Treasurer of Chilton County, Alabama, will appreciate your advising me upon the following statement of facts:

"Warrants are drawn on the Treasury of Chilton County by the Judge of Probate, after having been allowed by the Court of County Commissioners. These warrants are presented to the bank by the payee and the bank pays the payee the amount called for in the warrant, the bank collects all of the warrants which has been paid by it over a period of one week and presents the warrants to me for payment, and I give the bank a check on my account, as County Treasurer and take up the warrants. I am inclosing a copy of one of the warrants that you may be advised of the form of the warrants now being used by the Probate Judge and Commissioners Court of Chilton County, Alabama.

"I am asking to be advised if it would be legal for the bank to pay these warrants on the County Treasury and charge the warrants into my account in the bank as County Treasurer, and thereby avoiding the necessity of me giving my check on the County Treasury and taking up the warrants."

It is my opinion your inquiry must be answered in the negative. County treasurers have imposed upon them the nondelegable duty to receive and keep the money of the County and disburse it according to law. **(Ellis v. Batson, 58 So. 193, 177 Ala. 313.)**

Mr. Justice Anderson, speaking for the Court in the case supra, observed: (Section 211 of the Code of 1907 in declaring the duties of a county treasurer, among other things says: 'It is the duty of the county treasurer— (1). To receive and keep the money of the County and to disburse the same according to law.' This is an imperative and nondelegable duty, and any breach of same is a violation of law. While the statute does not authorize the county treasurer to have a deputy, it might be that he could employ a bookkeeper or clerk to assist him; but he cannot, under the law, delegate to said clerk or bookkeeper the unqualified right and duty of being the general custodian of the public funds, or the right to receive, keep, and account for same."

It is my opinion that should you permit the Bank to pay said warrants and charge them into your account as county treasurer, you would be delegating to said Bank the power to disburse the County funds which is a nondelegable duty. Section 303 of the 1928 Alabama Code provides in part as follows: "It is the duty of the county treasurer (1). To receive and keep the money of the County and **disburse** the same as below stated." Then said section outlines in detail the exact method of disbursing said funds in paragraph two through paragraph fifteen inclusive.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1939.

Hon. J. C. Pattillo,
Clerk Circuit Court,
Chilton County,
Clanton, Alabama.

QUO WARRANTO PROCEEDINGS — COSTS AND FEES — Quo warranto proceedings is a civil suit and cost and fees are not payable from fine and forfeiture fund. Cost and fees attach and are paid as in other civil suits.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of December 20, 1938, which is as follows:

"A Quo warranto proceeding was instituted in the Circuit Court of Chilton County, Alabama, against H. C. Chappell by 'The State of Alabama on Relation of Winston Huddleston as Solicitor of the Circuit Court of Chilton County, Alabama.' This proceeding was directed at the illegal practice of medicine by the respondent, Chappell.

"It was determined by the Court that one of the proceedings was erroneously instituted or was defective, and on motion of the Solicitor this cause was dismissed. Section 9946 of the Code provides:

" 'If such action is at the suit of the state alone, and judgment is for the defendant, or the defendant is insolvent, the witnesses are paid as in other State cases; but if any person is joined with the state as informant, judgment must be rendered against him for the costs, if rendered for the defendant.'

"As you are probably informed, the per diem of witnesses in civil cases is $1.50, in criminal 75c. Please advise me whether or not the

per diem and mileage of witnesses summoned for the State in this proceeding are properly payable out of the Fine and Forfeiture Fund of the County, and if so, whether the rate of $1.50 per day or 75c per day. Attention is called to the statement in the above code section, 'The witnesses are paid as in other State cases.'

"Upon the reinstitution of a second Quo Warranto proceeding against Chappell the per diem and services of the Clerk and Sheriff for summoning said witnesses was by the judgment of the Court charged against the State of Alabama. All other costs in the case, including the costs of the date of the final trial, were charged against Chappell. Please advise me also whether or not the per diem and mileage of the witnesses and also the officers' fees in this proceeding are properly payable out of the Fine and Forfeiture Fund. In this case attention is called to the fact that a judgment was rendered in the final cause for the State and Chappell was excluded from the practice of medicine."

I am of the opinion that both of your inquiries should be answered in the negative.

Proceedings in the nature of quo warranto to exclude one from practicing medicine is a civil proceeding. — **Fraser v. State,** 216 Ala. 426, 113 So. 289; **Harris v. State,** 215 Ala. 56, 109 So. 291. Since payments from the fine and forfeiture fund are made in criminal cases only, it follows that fees of officers and witnesses arising out of Quo Warranto proceedings cannot be paid from said fund.

Since quo warranto proceedings are civil, in my opinion, the same witness fees attach as in other civil cases, viz. $1.50 per day under Section 7233, Code of 1923.

This brings in to consideration of Section 9946, Code of 1923, which is as follows:

"Section 9946. When costs against State; when against informant.— If such action is at the suit of the state alone, and judgment is for the defendant, or the defendant is insolvent, the witnesses are paid as in other state cases; but if any person is joined with the State as informant, judgment must be rendered against him for the costs, if rendered for the defendant."

The clause "the witnesses are paid as in other State cases" as used in this section, in my judgment, means paid as in other civil cases where the State is liable for costs.

Under the facts set out in your first inquiry the State would be liable for all of the costs, as in other civil cases, where it fails. (See Sections 9946 and 9947, Code of 1923).

In my judgment the trial judge had no authority to apportion the costs under the facts presented in your second inquiry. Section 9944 Code of 1923 specifically provides that if judgment be rendered against the defendant, the plaintiff recovers costs against such defendant. Our Supreme Court,

in construing Section 9947, Code of 1923, which contains a similar provision as Section 9944, held that the costs could not be apportioned. **Ham v. State,** 172 Ala. 239, 54 So. 996.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 23, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Ad valorem taxes — steamships, barges, vessels, and watercraft— Revenue Act of 1935 — Section 10(c), p. 264.

Steamships, barges, vessels, and watercraft of every name and kind, transitorily plying waters of Alabama, without a permanent or temporary situs at any point except the principal office of the corporate owner, are subject to state, county, district, and municipal ad valorem taxes lawfully imposed at the location of the principal office in Alabama of the corporate owner, and should be returned for taxes to the tax assessor of the county in which such principal office is located.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your request for an opinion as follows:

"Please advise me whether, in your opinion, all steamboats, barges, vessels and watercraft of every name and kind, however propelled, plying waters of this State owned by a corporation with a principal office in this State are subject to municipal and special district taxes as well as State and County ad valorem taxes, in effect at the place where such principal office is located under existing laws (Section 10c Revenue Act of 1935); and do the laws require that returns for taxation of such property be made to the Tax Assessor of the County where such principal office is located.

It is my opinion that the property mentioned in your inquiry is subject to ad valorem taxes lawfully imposed by the State of Alabama, and all of its political subdivisions, at the location of the principal office of the corporate owner, provided said property is used transitorily and does not obtain a permanently or temporary situs, as distinguished from a transitory presense, at any point other than the location of the principal office, and should be returned to the Tax Assessor of the county in which the principal office is located.

The Supreme Court in the case of **National Dredging Company v. State,** 99 Ala. 462, judicially determined (page 467) as follows:

"There is nothing in the nature of this particular property (watercraft) to take it out of the general principle. The fact that it is floating property and may be moved from place to place and port to port by water furnishes no more reason for exempting it from taxation here than would exist for the exemption of property which did not float and could be moved from place to place only overland."

The case of **Alabama Clay Products Company v. City of Birmingham,** 148 So. 328, approved a principle as follows:

"The purpose of the statutory requirement of a charter designation of location is primarily for the benefit of the public; such as the fixing of jurisdiction of courts, facilitating service of process, the tax situs, a place of contact for persons having occasion to find the responsible management, etc."

Addressing his judicial remarks to the contention of the City of Mobile that it was entitled to collect ad valorem taxes on a ferry boat plying daily from the eastern shore of the Mobile Bay to the City of Mobile, transporting freight and passengers, whose owners reside in Baldwin County, Chief Justice Brickell in the case of **Mayor, etc., of Mobile v. Baldwin,** 57 Ala. 62, deciding adversely to the contention of the city, made judicial observations as follows:

" * * * If it be visible, tangible property, or if it be property not having a visible, tangible existence, yet a legal existence, capable of an actual situs, it is the actual situs, not the domicile of the owner, most material to be considered. Protection is the legal and constitutional consideration of taxation, and that must be presumed to be afforded where it is a necessity and a duty. If the owner of personal property separate it from his domicile — commits it to another jurisdiction, so that it is not distinguishable from other property of a like kind within that jurisdiction, or from similar property casually, in the usual course of its use and enjoyment, coming within that jurisdiction — he takes it away from the jurisdiction of his domicile and commits it, not to the comity, but to the power of the place to which he transfers it. A vessel merely touching at Mobile, in its ordinary course of navigation and trade, would not become liable to taxation, State, county, or municipal. It is while there, entitled to protection, and would receive it, from all governmental authorities. Taxation could not be imposed, for the protection afforded is not of the character of which it is the consideration. It is afforded on principles of public policy and sound morality, lying at the foundation of organized society and civil laws. * * *

"The appellee, Baldwin, employed the steamer "Anne," only according to its capacity for use, from his domicile to the city of Mobile. The city was one of the termini of its daily trips. When not employed, the mooring place of the boat was not within the city, but at the domicile of the appellee. This was the point from which the trips were commenced, and to which the boat returned when these were concluded. A stage-coach, or a market-wagon, or other vehicle, plying daily to the city, returning daily to the home of its proprietor, without the city, or

the horse which one may daily ride into the city, remaining there on business or pleasure during the day, would have been as fitting subject of municipal taxation. The situs of these would have been as completely separated from the domicile of the owner as was the situs of this boat. * * *

" * * * If personal property has not a determinate situs different from that of the domicile of the owner, as a general proposition, it is taxable only at the latter. Under the charter of the city, it must have within the city a situs, fixed and permanent, or a temporary situs, as distinguished from a transitory presence in the course of trade and commerce, to subject it to taxation. * * * The owner never separated it from the jurisdiction of his domicile, and incorporated it with the property of the city. * * *

"The fact that the owners of the boat do not reside within the city, prima facie relieves it from municipal taxation. It is, however, the actual situs of the boat, permanent or temporary, which it is most material to consider in determining the liability. If the boat had such situs within the city, under the views of the charter we have expressed, it is the subject of municipal taxation. If it had not, and it presence in the city was merely transitory, in the court of its employment, it was not liable to such taxation. * * * "

The legislature incorporated in the Revenue Act of 1935, Section 10(c) as follows:

"All steamboats, barges, vessels and watercraft of every name and kind, however propelled, plying waters of this State and the owner thereof shall return same for taxation to the assessors in the county wherein he resides and if such steamboat, barge, vessel and watercraft, is owned by a corporation, **then in that county where its principal office is located."**

Thus, the legislature has determined that the tax situs of the property mentioned in your inquiry is that location which the corporate owner uses as its principal office. In fixing the tax situs at the location of the principal office of the corporate owner, as distinguished from the charter location, the legislature precluded the fixation of a fictitious charter designation by the corporate owner to escape taxes, as was under consideration in the case of **Alabama Clay Products Company v. City of Birmingham,** supra, and which the court held could not be done.

This opinion is restricted to the enumerated property which is used transitorily, and has no fixed situs other than the principal office of the corporate owner. I pretermit discussing the tax jurisdiction of such property which actually has a permanent situs other than the principal office of the corporate owner. This question was not presented.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 23, 1939.

Hon. A. H. Collins,
Superintendent of Education,
Capitol.

Marion County — Term of office of member of the County Board of Education.

Under Local Acts 1936-1937, p. 49, the term of office of a member of the County Board of Education of Marion County began immediately after the general election in November, at which he was elected.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"On November 8, 1938, Mr. Hubert McCarley, a resident of District No. 3 of Marion County, Alabama, was elected as a member of the County Board of Education of Marion County; on November 12, 1938, he took the oath of office; and on November 14, 1938, the Marion County Board of Education held a meeting. At this meeting, Mr. McCarley presented his qualifications and requested admission to the board. Mr. McCarley was elected to succeed Mr. F. H. Harbor. At this meeting Mr. Harbor refused to give up his place to Mr. McCarley.

"On November 17, 1938, another meeting of the County Board of Education was held and Mr. McCarley was again refused admission to the meeting. Business was transacted by the Marion County Board of Education at this meeting, as well as at the one held on November 14, 1938. Your opinion is requested on the following questions:

"1. Is the county board of education compelled to admit new members at its first meeting following the general election on November 8?

"2. Who was legally entitled to vote at the November 14 and November 17 meetings, Mr. McCarley or Mr. Harbor?

"3. If Mr. McCarley was a legal member of the Marion County Board of Education on November 14 and November 17, and he was not permitted to attend the meetings of the board held on that date, was the business transacted at those meetings legal?"

In my opinion, a member of the County Board of Education elected on November 8, 1938, should have been inducted into office as soon thereafter as he qualified in the manner provided by law.

By Local Acts Extra Session 1936-37, p. 49, provision is made for the election of members of the Board of Education of Marion County and for fixing their terms of office Sections 2 and 4 thereof provide in part as follows:

"Section 2. At the general election of State and County officers in 1936, 1938 and 1940 a member or members shall be elected for terms of six years to succeed a member or members whose term of office ex-

pires at that time, by the qualified electors of the respective sub-division of the County as follows: * * * (b) At the general election of 1938 one member shall be elected from, and by the qualified electors of, sub-division No. 2 which shall comprise and include the following beats or precincts, viz: Nos. 1 (Hamilton) 6 (Reid) and 19 (Wigginton).

"Section 4. That nothing herein shall be construed to limit the term for which he was elected, of any member of said Board of Education serving as such on the effective date of this Act."

Prior to the effective date of the Local Act, the term of office of members of the County Board of Education of Marion County was governed by the provisions of general law. Section 89 of the School Code of 1927 provides that:

"At the general election of State and County officers, a member or members shall be elected for terms of six years to succeed member or members whose term or terms of office expired at that time."

So that, both under the general law and under the Local Act, quoted supra, the term of office of the incumbent member of the County Board of Education for Sub-division No. 3 of Marion County, expired at the time of the November 8, 1938 election; and the successor elected in said election, upon his qualification as the law requires, became a member of the County Board of Education and the incumbent ceased to have any official connection with the said board.

The answers to your first inquiry dispenses with the necessity of directing this opinion to your second inquiry.

Answering your third inquiry, it is my opinion that if a quorum was present and participated at the meetings of the board held on November 14 and November 17, their acts were not illegal, although one member, Mr. McCarley, was inadvisedly excluded from participation therein.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 23, 1939.

Hon. J. F. Aldridge,
Circuit Solicitor,
17th Judicial Circuit,
Eutaw, Alabama.

Where taxpayer prevails in an appeal from the assessment made by the Board of Review, costs should be given to the successful party or apportioned at the discretion of the court as provided by Section 7221, Code of Alabama, 1923, and such costs should be paid as authorized by Section 382 of the Revenue Laws of 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 27, 1938, requesting my opinion as follows:

"Section 78 of the General Revenue Act of 1935, provides for appeals by the taxpayer from assessments made by the Board of Review and provides that bond shall be given to cover all costs. I have taken the position that the taxpayer has to pay the costs in the Circuit Court, whether he wins or loses. I find no provision in the Act which makes the State and County liable for any costs. Will you please advise me in reference to this matter as soon as possible. I want this opinion for the Clerk of the Circuit Court."

In my opinion where a taxpayer appeals from an assessment made by the Board of Review and is successful, the costs should be assessed as provided by Section 7221, Code of Alabama, 1923, and should be paid, if assessed against the State as provided by Section 382 of the Revenue Laws of 1935. In the case of **State v. Donaldson,** 209 Ala. 400, 96 So. 617, the Supreme Court speaking through Mr. Justice Miller says:

"When the taxpayer appeals from this judgment to the circuit court, he must give bond with sureties, conditioned to pay all the costs created by the appeal, and to abide and perform the judgment rendered in the premises. Section 108, Rev. Act, 1919, p. 317. The cost created in the trial in the commissioners' court follows the cause on appeal into the circuit. In the circuit court the trial is de novo. Section 108, Rev. Act, 1919, p. 317. Both the state and county are interested in the result of the suit; both share in the taxes from the property of the taxpayer, the defendant; both are parties to this suit * * * This is in its very nature a civil suit, with the state of Alabama and county of Coffee as plaintiffs, and the taxpayer, Donaldson, as defendant. Section 3662, Code of 1907, as amended Acts 1915, p. 598, (Now Section 7221 of Code of 1923) reads in part:

" 'The successful party in all civil actions is entitled to full costs for which judgment must be rendered, unless in cases otherwise directed by law, or by the judgment of the court. The court may apportion the costs at his discreiton as justice and equity may require; and this provision is applicable in all cases in which the state is a party plaintiff in civil actions as in cases of individual suitors.'

"This statute is applicable to, controls, and governs the taxation of the cost in this proceeding in the circuit court. The court did not err in taxing the court of county commissioners of Coffee county with the court cost, and directing that it be paid by the county commissioners, as required by law—meaning out of the funds of Coffee County."

The Donaldson case is cited with approval in **Bynum Brothers v. State,** 216 Ala. 102, 112 So. 348, wherein the Supreme Court concluded that where a taxpayer appeals from an assessment the successful party should be given full costs. The court observes however, that the effect of Section 7221 was to make applicable at law the rule in equity as to apportionment of the costs by the court at its discretion, and as justice in equity may require, citing **Manning v. Carter,** 201 Ala. 218, 77 So. 744.

In the event the costs are taxed against the state, they should be paid in accordance with Section 382 of the Revenue Laws of 1935, which provides:

> "Section 382. Any court costs taxes against the State shall be paid by the State, and the various taxing subdivisions thereof in proportion to the amount of taxes levied by each. The sworn certificate of the Clerk or Register approved by the State Comptroller shall be authority for the issuance of any payment of warrants therefor by the proper officers of each taxing authority, and shall be treated as a preferred claim."

This office is an opinion rendered under date of October 7, 1937, to Hon. Chas. W. Lee, State Comptroller, (Quarterly Reports, Vol. 9, page 21), held that this section was limited to those instances where court costs were assessed against the State in cases involving ad valorem or license taxes. This opinion was rendered prior to the case of **State v. Pullman Standard Car Manufacturing Co.,** 179 So. 541. The opinion to Mr. Lee is hereby modified to conform to the conclusions reached in that case and to hold that Section 382 does not apply to license cases and that the State cannot pay costs in license tax cases in the absence of a definite statute authorizing the court to assess the same against the State.

Premises considered, you are therefore advised that where a taxpayer prevails in an appeal from the assessment made by the Board of Review, the costs should be given to the successful party, or apportioned at the discretion of the court, as provided by Section 7221, supra, and such costs should be paid as authorized by Section 382 of the Revenue Laws of 1935.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 25, 1939.

Hon. J. F. Davis, President,
Court of County Commissioners,
Covington County,
Andalusia, Alabama.

Statutes—

Limitation of the repealing provisions of Section 6772 of the Code of 1923, as reincorporated into Act No. 669, Acts, 1931, refers only to any local acts which exist, and which are not unconstitutional; and the said limitation does not apply to Local Act 1919 (S. 27-Prestwood), pages 8-12, which is unconstitutional in part.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter requesting my opinion as follows:

"Please refer to your opinion under date of July 20, 1938, in answer to a letter of Hon. Charles W. Lee, State Comptroller, said opinion and letter being set forth in Vol. 12 of the Quarterly Report of the Attorney General for the period of July 1, 1938, through September 30, 1938. Also please refer to Section 6772, Code of Alabama, 1923 and advise me as follows:

"(1) Does Section 6771 as amended by Act No. 669, General Acts of 1931, at page 805 supersede Local Act 1919 (S. 27-Prestwood) pages 8-12, in view of Section 6772, Code of Alabama, 1923, which has never been altered, amended, or repealed?

"Section 6772, above referred to, was not mentioned in your opinion to Mr. Lee and I will appreciate your opinion in this connection at an early date."

Answering your inquiry, I am of the opinion that it is not a question of whether Section 6771 as amended by Act No. 669, General Acts of 1931, page 805, supersedes Local Act 1919 (S. 27-Prestwood) pages 8-12. Those provisions of Section 16 of said Local Act which purport to authorize (in addition to the compensation allowed to members of county governing bodies by general law) "reasonable sums for expenses as they may severally spend and be entitled to for and on behalf of the county in the proper and legitimate exercise of their duties by order of the courts are unconstitutional, because they violate Section 96 of the Constitution of Alabama, denying to the Legislature the power to enact a law not applicable to all Counties of the State, regulating costs and charges of courts, or fees, commissions, or allowances of public officers." **(Carnley vs. Moore,** 218 Ala. 274, 118 So. 409).

That part of said Section 16, being unconstitutional, is a nullity. It never could become a law. There would be nothing to repeal, or supersede. Section 6772, which is reincorporated into Act No. 669, Acts, 1931, supra, has a proper field of operation. Constitutional amendments have been adopted permitting the subjects dealt with in Section 6771 to be regulated by local law in certain Counties (the Second Amendment to the Constitution is an example of such amendments). Section 6772 refers only to such local laws as are provided for by constitutional amendment.

The conclusion of the former opinion of this office referred to (Quarterly Report, Vol. XII, page 80) correctly applies the law of the case.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 27, 1939.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Filing Tax—

Grantee entitled to deduct value of life estate retained by grantor in computation of amount to be paid as deed tax.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 28, 1938, in which you request my opinion as follows:

> "Mr. John S. Marks recently filed in this office for record three deeds, a copy of one of which I am enclosing herewith.
>
> "At the time these instruments were filed deed tax aggregating $68.50 was paid on these conveyances. I am in receipt of a letter from Mr. Marks, stating that in his opinion, he paid an excessive amount of deed tax and that he had taken the matter up with your office and asked me to secure an opinion on this question.
>
> "Please examine the enclosed copy of one of the deeds and you will note that it was conveyed subject to a life estate of the grantor. The other deeds were made subject to the same reservation. For your information, I am advised by the Tax Assessor of Jefferson County that the three-fourths undivided interest described in the enclosed copy is assessed at $18,000.00, which is 60 per cent of $30,000.00, the amount on which the deed tax was paid.
>
> "Mr. Marks is of the opinion that he is entitled to a refund, due to the fact that the value of the life estate should have been deducted in determining the amount of tax to be collected. Please advise me if the value of a life estate should have been considered in determining the amount of deed tax."

It appears from your letter and from the photostatic copy of the deed which you enclosed that the grantor has conveyed to the grantee title to the property in question, reserving unto himself a life estate. This is permissible under the law. **Graves v. Wheeler,** 180 Ala. 412, 417.

This office has heretofore held on many occasions that the filing tax for a deed is measured by the value of the property actually conveyed by the deed. See opinion rendered under date of October 14, 1935, to Hon. D. E. Laslie, Judge of Probate, Macon County. (Quarterly Report of Attorney General, Vol. I, page 66.)

The Supreme Court of Alabama in **Long v. Jasper Land Company,** 217 Ala. 593, 117 So. 210, 211, has held that:

> "The determination of the amount of tax to be paid on an instrument (offered for recordation) is left to the Probate Judge."

This statement is reiterated with approval in **Thompson, Probate Judge v. Smith,** 174 So. 796, certiorari denied by the Supreme Court in **Thompson v. Smith,** 174 So. 797. Therefore, in determining the amount of tax to be paid, it is your duty to investigate the circumstances and to determine the actual value of the property conveyed and to base the amount of the tax on such determination. In this instance the value would be the actual value of the lot, less the value of the life estate retained by the grantor.

For your assistance in determining the value of the life estate retained by the grantor, I call your attention to the statement in 21 C. J. 943, Section 75, which is as follows:

> "General rule is to calculate the value according to proper duration of the life estate, based upon tables of life expectancy but taking into consideration the habits, physical appearance, constitution and state of health of the life tenant and the other circumstances of the particular case."

This view has been restated by the Supreme Court of Alabama in the case of **Steiner Bros. v. Berney,** 130 Ala. 289, wherein that Court speaking through Mr. Justice Sharpe said:

> "Mortality tables though competent to be looked to as evidence, do not of themselves furnish a test of life expectancy upon which investors would be likely to rely. The life tenant's physical appearance so far as it is favorable to or opposed to longevity, and likewise the element of uncertainty which attends an income derived from short leases on residence property, are matters which doubtless would largely influence those proposing to purchase a life estate in such property. Unforeseen improvement occurring since the sale whether in the life tenant's health, or in demand for property, can throw no light on the present question which is of the value as it existed at the time of sale."

You are, therefore, advised that in computing the tax you must show the deduction of the value of the life estate determined by the above rules.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 28, 1939.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Land Agents—Entitled to the percentage, not to exceed 10%, stipulated in the contract held with the State Land Commissioner, on all monies received from redemptions of property that had been purchased by the State at tax sale, which redemptions were secured through their efforts, regardless of the time when the monies are actually paid or collected, and whether they are paid or collected before or after the contract which the agent held with the State Land Commissioner, has been terminated.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

We have your letter of January 21, 1939, which reads as follows:

"Under House Bill 1048, Mr. Henry S. Long, as State Land Commissioner appointed Mr. C. L. Patterson, agent for the State Tax Commission, to bring about redemptions from tax sale. This appointment was made October 10, 1935, and this office was notified by Mr. Henry S. Long, as State Land Commissioner that we were to pay 10% on all redemptions direct to Mr. C. L. Patterson, and this was sustained by the opinion of the Attorney General, December 3rd, 1935. Acting under this authority we have been paying each month to Mr. C. L. Patterson, as State Land Agent, 10% on all redemptions made in this office.

"We understand that the office of State Land Agent has now been abolished, and we would like an opinion as to whether or not this office should pay 10% to Mr. C. L. Patterson for January redemptions, or should we continue to pay on all Land Redemptions made in this office until we are notified by the State Executive Department of the severance of the agreement between the State Land Commissioner and the State Land Agent, Mr. C. L. Patterson."

We also have a letter from Hon. Matt A. Boykin, Judge of Probate, Mobile County, Mobile, Alabama, of the same date dealing with the same general subject. His letter reads as follows:

"Mr. S. H. Cochran, Land Agent, Mobile County, Alabama, was removed from Office January 19th, 1939.

"Please advise us if Mr. Cochran is entitled to ten per cent commission on the second, third and fourth, or remaining, installments on redemptions effected during his term of office."

These matters will here be considered together and this opinion will be our official answer to both of them.

The act pursuant to which the State Land Commissioner appointed land agents in the various counties, Mr. C. L. Patterson in Montgomery County and Mr. S. H. Cochran in Mobile County, is Act No. 440, General Acts 1935, page 916, approved September 13, 1935. This act reads as follows:

"Section 1. The State Land Commissioner, with the approval of the Governor, may contract with some person or firm in each county of this State to investigate sales of real property for taxes and bid in for the State, to notify parties at interest in such real estate of such sales, to secure redemptions of said property, to secure sales of said property subject to sale at private sale by the State.

"Section 2. For such services rendered under the preceding section, the State Land Commissioner may allow fair compensation, to be fixed in the contract, which shall not exceed 10% of the proceeds of such rent, sale or redemption, and shall be paid from the funds so received.

"Section 3. All laws and parts of laws in conflict herewith are hereby expressly repealed.

"Section 4. This Act shall go into effect immediately upon its passage.

"Approved September 13, 1935."

This office in an opinion rendered to you under date of December 3, 1935, Quarterly Report of Attorney General, Vol. I, page 291, advised you in regard to this act and the compensation of the land agent in Montgomery County, appointed pursuant to its provisions, as follows:

"The statute is silent as to how the compensation shall be paid, but it does provide that it should be paid from the funds so received. As a Judge of Probate receives monies paid in on redemption, presumably he should pay the land agent the commission before remitting.

"The land agent is entitled to his commission only in those cases where he investigates the sale, notifies the parties and secures the redemption.

"I presume that he will file sufficient evidence in each case for you to determine whether such redemption was brought about through his efforts."

In an opinion to Hon. W. M. Vaughn, Judge of Probate, Dallas County, Selma, Alabama, under date of February 21, 1936, Quarterly Report of Attorney General, Vol. II, page 194, we reaffirmed the holding of the above cited opinion to you and made certain other holdings in regard to the act quoted supra and the land agents appointed thereunder, and the payment of their compensation. In Judge Vaughn's request for opinion he asked the following questions among others:

"1. The contract is made by the Chairman of the Tax Commission with the land agent, and the commission is agreed upon between them. Under Section 2 of said Act isn't it clear that the entire 10 per cent shall be paid by the State (with whom he made his contract) from the funds so received (by the State)?

"2. Is there any authority of law whereby under any such contract the **Probate Judge** could **legally** deduct from any money due the **Board of Education** for any such commissions?

"3. Under Sec. 215 of the Constitution one-fourth of one per cent is levied and collected **exclusively** for road and bridge purposes. Could a deduction be made from such fund to pay said **commissions?"**

In answering the questions, we spoke as follows:

"Assuming that you desire a formal opinion on these questions, I advise you as follows:

"1. The Act in question (No. 440 H. B. 1048 approved September 13, 1935) provides:

(The Act was here set out.)

"It is to be noted that the Act applies only in cases where lands have been sold to the State.

"Section 2 provides for the compensation of the Land Agent 'which shall not exceed 10 per cent of the proceeds of such rent, sale or redemption, and shall be paid from the funds so received.'

"I think the opinion to Judge Hill, to which you referred answers your first question. However, I call to your attention opinion to Hon. Eugene H. Hawkins, Probate Judge of Jefferson County, dated November 22, 1935. I held, inter alia:

" 'Presuming a valid sale, and any discussion is necessarily made upon the hypothesis of a valid sale, the State has foreclosed its lien and the judgment which includes the tax is satisfied and the title to the property passes to the State absolutely."

"And on page 5 of said opinion, it was stated:

" 'After the sale to the State there can be no new assessment or tax liability. While the amounts required to be paid upon redemption for the years subsequent to the sale are loosely termed annual taxes, such terminology is merely one of convenience, to describe the annual **amounts** which the Legislature has declared shall be paid. The fact that the Legislature has endeavored to have such amounts approximate what the annual taxes would have been if the property had been individually owned, does not convert such "amounts" into "taxes" or the annual valuations provided by the statutes into "assessments." '

"From this, it appears that the amounts payable on redemption are not strictly taxes, and are subject to such distinction and disposal as the Legislature may make.

"Even treating the amounts received as taxes, however, it would appear that the rule laid down in Shaver v. Robinson, 59 Ala. 195 and approved in Jefferson County v. City of Birmingham, 221 Ala. 476 (129 So. 48), in City of Birmingham v. So. Express Co., 164 Ala. 529 (51 So. 159) and State v. Jefferson Co., 17 Ala. App. 460, 86 So. 88, 204 Ala. 393, 86 So. 89, cited in opinion to Hon. R. E. King, Tax Collector of Mobile County, under date of January 11, 1935, holding that taxes can be charged with the expenses of assessment and collection, would authorize the payment of reasonable compensation to the land agent, such being a part of the expenses of collection, just as is the amount the Probate Judge receives for his services. What amount is reasonable is a legislative question.

"The compensation being based upon the 'proceeds' and upon redemption, such proceeds, being payable to the Judge of Probate, it appears to follow that he should pay the land agent upon proper showing of services rendered as outlined in the opinion to Judge Hill above referred to by you.

"The foregoing answers question 2 and 3. The effect of the cases cited is that all taxes bear their proportion of the expense of collection. Under the reasoning in the opinion to Judge Hawkins, the matter would be exclusively legislative in my judgment."

In a subsequent opinion to you under date of September 19, 1936, Quarterly Report of Attorney General, Vol. IV, page 190, we held that the land agent was entitled to 10% (the contract of the land agent of Montgomery County calling for 10%) of the amount received by the State as tax or proceeds received from the sale or redemption of the real property only and that he was not entitled to 10% of the officers' fees included in the total amount paid on the sale or redemption.

In an opinion to Hon. Evan J. Owen, Land Agent, Etowah County, Gadsden, Alabama, under date of December 29, 1937, Quarterly Report of Attorney General, Vol. IX, page 169, we held that the land agent was not entitled to a fee or commission on monies collected on the second or later installments on real estate redeemed on the four year plan, even though these payments were made during his tenure of office as land agent, when the said land was originally redeemed prior to his tenure as land agent and the first installment was paid thereon at that time. In that opinion, we made the following statement:

> "Before you (the land agent) would become so entitled under this provision (i.e., entitled to receive commission on second and later installments paid on redemptions under the four year plan), you must have been instrumental in bringing about the redemption in the first instance."

Therefore, it seems that this office has previously answered the questions in both the letter from you and the letter from Judge Boykin. In any event, on the same basis of the above quoted act, and the holdings of the opinions hereinabove cited and quoted from, and the reasoning given in support of the same, we now advise you as follows: The land agent of Montgomery County is entitled to be paid 10% (his contract calling for 10%) of the monies paid to you for redemptions which he secured, effected, brought about, or caused to be made during his tenure of office, regardless of when these monies are paid to you, and regardless of whether they are paid to you before or after his tenure of office ceases; and that the same should be paid to him by you upon his presenting proper proof to you that he secured, effected, brought about or caused to be made the redemptions for which the monies were paid to you.

It would necessarily follow that the land agent of Mobile County is entitled to 10% commission (if this is the percentage called for in his contract with the Land Commissioner) out of the monies paid to the Judge of Probate of Mobile County on the second, third, fourth, or remaining installments on redemptions made on the four year plan which were secured, effected, brought about or caused to be made by him during his term of office, even though these monies are paid after he was removed from office, upon making satisfactory proof to the Judge of Probate that the original redemption for which these monies are paid to the Judge of Probate was secured, effected, brought about or caused to be made by him.

The above conclusions are in accord with the previous holdings of this office on this and similar questions. On March 6, 1934, this office rendered an opinion to Hon. S. D. McGee, Tax Collector, Tuscaloosa County, Tuscaloosa, Alabama, Biennial Report of Attorney General, 1932-1934, page 522, in which we answered the following question which he had propounded to this office:

"5. Does the $6000 per annum limit provided for in the Constitutional Amendment above referred to (the so-called Sparks Amendment) apply to fees and commissions paid by me to the Assessor on and after August 1, 1933, for assessments made by him prior to that date?"

We answer that question as follows:

"In answer to question 5 it is my opinion that the $6000 per annum limit provided for in the Constitutional Amendment does not apply to fees and commissions which have been actually earned by the Tax Assessor prior to September 1, 1933.. While you will not pay the Tax Assessor these fees until after October 1, 1934, it is my opinion that the amendment does not apply to fees and commissions which were earned prior to the adoption of the Amendment even though the payment is made thereafter."

In an opinion of this office to Hon. L. A. Garrison, Judge of Probate, Walker County, Jasper, Alabama, under date of October 14, 1935, Quarterly Report of Attorney General, Vol. I, page 62, we spoke as follows:

"It is my judgment that fees and costs of officers which are collected on redemptions should be paid to the officers entitled to such fees and in your case, (here the Tax Collector who had performed the services was no longer in office at the time the fees were paid), to the Tax Collector who was in office at the time of the sale, or at the time the fees accrued."

In an opinion to Hon. W. W. Ramsey, Associate Member, State Tax Commission, Capitol, under date of July 17, 1935, Biennial Report of Attorney General, 1934, 1936, page 236, we held:

"Where outgoing license inspector cites delinquent for license and at his instance legal civil suit is filed and prosecuted to judgment, from which an appeal is taken, and the appeal is ultimately determined in favor of the State, but after such outgoing license inspector has retired from office, upon the payment of the money such outgoing license, inspector is entitled to the fees due the license inspector rather than the incoming license inspector."

The conclusions of the three opinions last hereinabove cited and the reasoning given in support thereof also are in accord with the conclusions hereinabove announced and are here cited in support thereof.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 30, 1939.

Hon. Ben Reeves, Sheriff,
Pike County,
Troy, Alabama.

Justices of the Peace—

Fines and forfeitures collected for violations of the highway laws cannot be applied to pay costs in other cases of highway violations in which cases no costs are collected, under Section 3850 (2), Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

This is to acknowledge receipt of a letter of recent date from your predecessor in office, which is as follows:

"Please give me your opinion on whether or not a Justice of the Peace is entitled to insolvent cost in Highway cases when defendant is discharged out of the highway fines collected from other cases."

In regard to the inquiry, I presume reference is made to the authority given justices of the peace under Section 3850 (2), Code of Alabama, 1923, which provides in part as follows:

"He may deduct from fines and forfeitures collected by him, the amount due for his fees and those of the constable in cases in which the defendant was acquitted, or insolvent and unable to pay after conviction, a sum not to exceed fifty dollars for any calendar month; * * *"

It is my opinion that the above section does not apply to fines and forfeitures collected for violations of the highway laws, either the Highway Act of 1927 (General Acts 1927, p 348), (see Sec. 106 thereof), or the Highway Patrol Act of 1935 (General Acts 1935, p. 756), (See Sec. 8 thereof). (See also General Acts 1936-37, p. 229). Both of these acts, and subsequent amendments thereto, specifically provide for the disposition of fines and forfeitures collected thereunder, Cf. Quarterly Report of the Attorney General, Vol. X, p. 38. Such fines and forfeitures must, therefore, be applied in accordance with the mandates of the statutes in question and cannot be applied as provided for in said Section 3850(2), Code of Alabama, 1923, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 30, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Sheriffs — Arresting Fee —

The Sheriff of Mobile County, who under and by authority of a Local Act approved October 3, 1932, Local Acts 1932, page 33, appoints patrolmen to perform the duties designated by said Act would be entitled to the arresting fee when an arrest is made by such patrolmen, and the fact that they are on a salary paid by the county could make no difference.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have a letter addressed to this office by Hon. Chas. W. Lee, former Comptroller, in which he requests the following opinion:

"Under authority of Local Acts, Extra Session 1932, page 33, Mobile County employs three road patrolmen as provided for in said Act, to patrol the public highways of said county, to enforce all laws relating to the operation of automobiles and motor vehicles on the public highways of said county and State.

"In view of the fact that said patrolmen are paid regular salaries by the county and their duties are so defined and specific as relating to highway laws and violations of same, the question arises as to fees earned by said officers in the performance of their duties.

"1. Would the Sheriff of Mobile County be entitled to an arrest fee, when the arrest was made by a County Road Patrolman?

"2. Would the Sheriff of Mobile County be entitled to an arrest fee, arrest made by county road patrolman, collectible from the Fine and Forfeiture Fund 'General Fund' on cases that are Nolle Prossed for highway law violations?

"These patrolmen are employed for this service and where the Sheriff collects for an arrest made by a patrolman on nolle prossed cases it is apparent that the county is paying twice for a service that they have already provided for by the employment of these patrolmen. For your information there is no fine and forfeiture fund in Mobile County, such claims are payable from the General Fund."

The Act which is referred to in the letter addressed to this office is Act No. 87, H. B. 488, approved October 12, 1932, Local Acts, 1932, page 33. The pertinent parts of this Act are as follows:

"Section 1. That in Mobile County, Alabama, the sheriff is hereby given authority to employ as many patrolmen as he may deem necessary

not to exceed three, to patrol the public highways of said county for the purpose of enforcing the motor vehicle act and all laws on the statute books relating to the operation of automobiles and motor vehicles on the public highways of said county and all traffic laws on the statute books of the State of Alabama.

Section 2. The said patrolmen shall be vested with the authority and duties of deputy sheriffs.

"Section 3. The salaries of such patrolmen shall be $150.00 per month for each patrolman, such salaries to be paid by the county out of the general funds of said county as the salaries of other county employees are paid.

"Section 4. All patrolmen employed under the provisions of this act shall hold office at the will of the sheriff so appointing them but not beyond the expiration of the term of such sheriff."

I am of the opinion that the law officers appointed under the provisions of the above-quoted act, while designated as patrolmen, are, in fact, deputy sheriffs and operate under the Sheriff of Mobile County as any other deputy sheriff operates, even though they are assigned to specific duties, as prescribed in the Act.

Section 10188 of the Code of Alabama of 1923 provides that sheriffs in all counties of this state with a population less than 200,000 who are not paid a salary by the county, may appoint a chief deputy sheriff whose salary is payable by the county.

This office has heretofore held, in an opinion rendered on June 23, 1931, to Hon. Minus H. Johnson, Clerk of the Circuit Court of Walker County (Biennial Report of Attorney General, 1930-32, page 343) that a sheriff who is on a fee basis is entitled to all legitimate fees, even though the services for which the fee is charged are performed by salaried deputies.

It is my judgment that the opinion heretofore referred to answers your first inquiry. It is my opinion, therefore, that the Sheriff of Mobile County can legally be paid fees for services performed by the county road patrolmen appointed under the provisions of the 1932 Local Act, supra.

I am of the opinion that your second inquiry should likewise be answered in the affirmative. It is my judgment that the Sheriff of Mobile County is entitled to receive fees in the same amount and from the same source for services performed by a county road patrolman appointed under the provisions of said Local Act, as if the services had been performed by any other deputy sheriff.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 30, 1939.

Hon. W. C. Bragg,
County Treasurer,
Fayette County,
Fayette, Alabama.

Costs and Fees — Justices of the Peace—

Costs accruing to a justice of the peace who issues a warrant for a criminal offense, which is returnable to the county court, cannot be paid from the fine and forfeiture fund of the county upon the acquittal of the defendant, or the entry of an order of nolle pros. in said county court or the death of the defendant.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of inquiry in which you request my opinion as follows:

"Is a Justice of Peace entitled to fee of 25c for acknowledging complaint and 50c for issuing warrants returnable to county court to be collected like other costs, even though case is nol prossed or defendant found not guilty.

"Reference is made to your opinion of February 3, 1937, to Hon. R. L. Mosley, Clerk of Circuit Court, Fayette County, Alabama, in regard to the above captioned matter.

"Please advise me if the County Treasurer of Fayette County is authorized to pay Justices of Peace the above fees out of the fine and forfeiture fund of the County."

In my opinion, the fees of justices of the peace accruing upon the issuance of a warrant, which is returnable to the county court, in cases where the defendant was later acquitted or an entry of nol pros. is made in the county court, or the defendant died and the case is abated thereby, cannot be paid from the fine and forfeiture fund of the county.

The opinion of this office to which you refer (Quarterly Report of Attorney General, Vol. VI, page 59) does not deal with the question as to whether or not the justices' fees are payable from the fine and forfeiture fund. It is, therefore, not pertinent to your inquiry.

The Supreme Court has decided this exact question in **Hawkins, ex rel. etc. v. State,** 124 Ala. 102, as follows:

"In the first place, let it be borne in mind, that the fine and forfeiture fund of the counties is subject alone to the control of the legislature, which has exclusive authority to prescribe what claims shall be paid out of it, and the conditions and preferences of payment.—Sessions v. Boykin, 78 Ala. 328. Again, when any public officer demands a fee for services rendered by him, he must point to some clear and definite

provision of the statute, which authorizes him to make the charge and demand. Statutes giving costs or fees, must be strictly construed and not extended beyond their letter.—Code, Section 4558; Troup v. Morgan County, 109 Ala. 162.

"The only question presented, therefore is, have we a statute which authorizes the fees claimed to be paid out of the fine and forfeiture fund of Jefferson County? * * *

"In all such cases, the costs arising on the preliminary trial before the justice, in case the defendant is bound over, follow the case into the court in which he is bound to appear, and is taxed at the end of the prosecution and collected as the statutes require. But, the statute nowhere authorizes costs growing out of prosecutions before a justice of the peace, when a defendant has been discharged, to be taxed against the fine and forfeiture fund."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 30, 1939.

Hon. D. E. Dunn, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Pabst Malt Tonic, containing less than one-half of one per cent alcohol, is not classed as malt or brewed beverage, under the Alabama Beverage Control Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

This is to acknowledge your letter as follows:

"Attached hereto you will find a copy of a letter from Premier-Pabst Sales Company and also a copy of an analysis showing the contents of a tonic that is being prepared for market.

"As shown on the analysis the alcoholic content is less than one-half of 1% and we would appreciate very much your opinion as to whether or not this would be classed as a malt or brewed beverage."

In my opinion the new Pabst Malt Tonic, to which you refer, should not be classed as a malt or brewed beverage, under the Alabama Beverage Control Act.

Section 1 (i) of Act No. 66, General Acts 1936-1937, p. 40, provides as follows:

"Section 1. Short Title — This Act shall be known and may be cited as 'Alabama Beverage Control Act.'

* * *

"(i) 'Malt,' or 'Brewed Beverages,' means any beer, lager beer, ale, porter, or similar fermented malt liquor containing one-half of one per centum or more of alcohol by volume, by whatever name the same may be called."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 31. 1939

Hon. Luther Fowler,
Tax Assessor,
Shelby County,
Columbiana, Alabama.

Taxation — Assessments — Description on assessment lists.

Section 39 of the Revenue Act of 1935 provides the manner of describing property listed for taxation; and the installation of card index or other system as a substitute therefor is not authorized.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"A large part of the work of this office consists of the copying each year of real estate descriptions, some of which are quite lengthy. Many of these descriptions, possibly 90 per cent, do not change from year to year.

"I would like to know if, under the law, it is necessary to copy these descriptions every year, or if some substitute plan could be used.

"I had in mind something like this:

"Copy the descriptions on a specially prepared sheet and file them by number. Then when the assessment is made it might read something like this—

"'_____ acres improved land
_____ acres pasture land
_____ acres timber land

as described in Description File No.....in the office of the Tax Assessor.'

"When a change in ownership is made it could be indicated in the Description File and in that way a permanent record of all changes would be kept.

"If some such plan could be worked out under the law it would greatly increase the efficiency of the Tax Assessor's work."

In my opinion your inquiry should be answered in the negative.

The Legislature has spoken to the question of the description of property assessed for taxation.

Section 39 of the Revenue Act of 1935 provides:

"The description of real estate may be as follows: 1. If it is an entire section, it may be described by the number of the section, township and range. 2. If it is a subdivision of a section authorized by the United States for the sale of public lands, it may be described by a designation of such sub-division, with the number of section, township and range. 3. If it is less or other than a subdivision, it may be described by metes and bounds, or in some way by which it may be known. Provided such description shall be sufficient without more to definitely locate and identify the property so listed and shall give the acreage included therein as nearly as known. 4. If it is in a city, town or village, surveyed and laid off, and a plat thereof is recorded in the office of the Judge of Probate of the County, or if a plat is accessible and if it is a whole lot, or block, it shall be described by the designation of the number thereof. 5. If it is in a part of a whole lot or block, it may be described by metes and bounds, or in some other way by which it may be known. Provided such description shall be sufficient without more to definitely locate and identify the property so listed and shall show the quantity of such land so listed. 6. If it is a tract of which the subdivision is not known to the Assessor it may be described by metes and bounds, or in some way by which it may be known. Provided such description shall be sufficient without more to definitely locate and identify the property so listed and shall show the quantity of such land so listed. 7. It shall be sufficient to describe lands to be assessed or sold for taxes by initials, abbreviations and figures. 8. Mineral, coal, oil, gas, timber and turpentine interests, when they have been so severed in ownership from the soil, or trees, by sale or otherwise, shall be separately returned for assessment, which return shall show the land in or on which said mineral, coal, oil, gas, timber and turpentine interest is located. 9. If the surface right only is assessed for taxation, the description of the land may be preceded or followed by the letters S. R., and if the mineral interest only is assessed, the description of the land may be preceded or followed by the letters M. R., or other notation showing the nature of the interest assessed and giving the acreage in or on which such right or rights is or are located."

The assessment lists containing such descriptions, as provided, supra, are bound permanently by the Tax Assessor, and when so bound constitute the book of assessments.

The question of improving upon the system provided by law is one which addresses itself to the Legislature. Unless such a change is authorized, the legality and validity of assessments so made seriously might be questioned.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 31. 1939

Hon. A. H. Collins,
Superintendent of Education,
Montgomery, Alabama.

Distributor, manufacturer, retail dealer, or storer of lubricating oil is liable for 2c per gallon excise tax upon lubricating oil sold to County Board of Education operating its own school busses, said excise tax being that provided for by the General Revenue Act of 1935 (General Acts of Alabama, Regular Session, Schedule 138, page 494.)

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of November 25, 1938 wherein you request the opinion as follows:

"Is a distributor, manufacturer, retail dealer, or storer of lubricating oil liable for an excise tax of two cents per gallon upon the selling of lubricating oil to a county board of education which owns and operates its school busses? (See Schedule 138 of Act No. 194 of the General Revenue Act of Alabama for 1935.)"

Your inquiry is answered in the affirmative. This question has been decided by the Supreme Court of Alabama in the case of **State Tax Commission vs. County Board of Education of Jefferson County,** 179 So. 197.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 31. 1939

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Licenses — Auctioneers selling at public outcry not subject to license levied by Schedule 11 of General Revenue Act of 1935 where property is ordered sold according to decree or order of court.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 21, 1938, requesting opinion as follows:

"Enclosed please find circular or advertisement for the sale of real estate at auction by one Britt Davis, auctioneer, selling for certain Banks in Clarke County for liquidation. This agent, Mr. Davis, was cited by the License Inspector for license under schedule 11 of the Revenue Code of Alabama. It is argued that Mr. Davis is exempt from this license under sub-head B of said schedule on the ground that said sale is ordered by Court. I understand the Liquidating Agent filed a petition with the Court asking that this real estate be sold in this manner for quick sale, and that the Court ordered it done. Please advise me if after all Mr. Davis is liable for the license as an auctioneer. A prompt opinion of this will be appreciated as we need to know at once in order to ascertain the amount of license, if any."

You have subsequently mailed this office at our request copy of decree of the Circuit Court upon the petition filed in said Court asking that the assets of the said bank be sold at public outcry. I note from this decree that it contains the following:

"It appearing to the satisfaction of the court that any and all sales of said real estate will be reported to this court for confirmation, it is the opinion of the court that said petition should be granted according to the prayer thereof."

The decree further sets forth the Court's approval of the contract between the Superintendent of Banks and the auctioneer, referred to in your letter, and the Court's order that the auctioneer be instructed to make the sales of real estate on the terms set out in said decree.

It is my opinion, based upon the foregoing information and exhibits, that the auctioneer would not be liable for the license prescribed by Schedule 11 of General Revenue Laws of 1935 (Simon's Compilation, page 221).

Subsection (b) of Schedule 11 provides as follows:

"In the following cases sales at public outcry may be made for compensation without license: * * * (b) Sales of property conveyed by deed of trust, mortgage or decree, or **ordered to be sold according to** the mortgage, **decree or order.**" (Emphasis supplied).

From the information contained in your inquiry, it is apparent that the sale mentioned therein is to be held under the direct supervision of the Circuit Court, the Court order specifically stating that any and all sales of said real estate are to be reported to the Court for confirmation. All of the other matters appearing in said decree of the Court make it clear also that the property is "ordered to be sold according to the decree or order" of the Court and, therefore, that such sales come within the exemption noted in Schedule 11.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 31. 1939

Hon. James B. Little,
Superintendent of Banks,
Capitol.

Banks and Banking — Funds remaining in hands of Superintendent of Banks due depositors, creditors and stockholders of liquidated bank, which are uncalled for within three years after final liquidation, should be transmitted to the State Treasurer under Section 6363, Code of 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of a letter of January 12, 1939, from your predecessor in office, which is as follows:

"The Farmers and Merchants Bank was by proper authority of its Board of Directors turned over to the Superintendent of Banks for liquidation. Its business and affairs have been liquidated as provided by law.

"There were sufficient funds realized from the assets to make full payment to depositors and creditors and a substantial amount to the stockholders. It has been three years since a final settlement has been made of the affairs of the trust. We have been unable to make payment to all of the depositors by reason of the fact that we were unable to locate them. We have likewise been unable to make payment of the liquidating value to some of the stockholders because their present addresses are unknown.

"We are preparing a list of the unpaid depositors and creditors with the view of certifying the funds into the State Treasury, as provided by Section 6363 of the Code of Alabama of 1923. Your opinion is desired

as to whether we should include in our report to the State Auditor, and transmit to the State Treasurer, undisbursed funds due stockholders of this trust as well as fund due depositors and creditors."

I am of the opinion that your inquiry should be answered in the affirmative.

Section 6363 of the Code of Alabama of 1923 provides as follows:

"Funds of liquidated banks transmitted to treasurer by superintendent of banks. — The superintendent of banks shall certify to the treasurer of the state a complete list of funds remaining in his hands uncalled for, which have been left in his hands in his official capacity, in trust for depositors in and creditors of any liquidated bank, from which they were received after they have been held by him for three years from the date of the final liquidation of the institution along with his certificate, he shall transmit to the treasurer the funds, with accumulated interest thereon, which he has so held in trust for three years. A copy of such certificate shall also be filed with the state auditor who shall make a record thereof."

The word "creditors" as used in the above section, in my opinion, is sufficiently broad to cover stockholders who could not be located. After all creditors, depositors and other claims and charges against a liquidated bank have been paid and there remain other funds, the stockholders are entitled to same. Therefore, in my opinion they may be termed "creditors" of the liquidated bank within the meaning of the above-quoted section.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 31, 1939.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Insane persons — Escape — Expenses of return to asylum —

The expenses of return of an insane patient, committed to state hospital from Jefferson County, and who escaped and is apprehended in Conecuh County, are not payable by Conecuh County.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Recently, an escape from the Searcy Hospital at Mt. Vernon, was picked up by the Sheriff in Evergreen, and, for the safety of the patient, placed in jail. This patient had been committed to the Insane Asylum from Jefferson County and had made his way to Evergreen. The sheriff here delivered this patient back to the Searcy Hospital but has received no pay for doing so. Whose responsibility is it for payment to the sheriff here for delivering this patient to Mt. Vernon?"

In my opinion, no compensation may be paid to the sheriff for his services in this instance.

The law of fees and costs is penal and must be strictly construed. Before an officer is entitled to compensation for a service rendered, he must be able to point to some provision of law which allows the same, either expressly or by necessary implication.

No provision of law allows a fee for the apprehension of an escape insane person and his return to the insane hospital. In the absence of such a provision, no compensation may be paid to the sheriff or to any other person for such service.

It is true that Section 1445 of the Code of Alabama, 1923, provides that after due inquisition as to the sanity of any resident of the county, he is found insane by the Judge of Probate thereof, and application has been made to and approved by the insane hospital for the admission of such person, that the Judge of Probate "shall depute one or more persons, relatives, friends or officers, as he may see fit, to convey the patient to the hospital and all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury on order from the county commissioners." However, this section applies only as to residents of the county who are ascertained to be insane and require hospitalization at insane hospitals. Under the facts detailed in your request, the insane person, committed to the asylum from Jefferson County, escaped and was apprehended by the sheriff of Conecuh County. So that, the insane person was neither a resident of Conecuh County nor committed from that county. Section 1445, supra, does not apply in such cases.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 31. 1939

Hon. Frank N. Julian,
Superintendent of Insurance,
Capitol.

Insurance —

1. Foreign insurance companies not authorized to do business in this state through legally commissioned agents but who solicit

and secure insurance through the mails are not, upon making application to be permitted to do business in this state, liable for the penalties imposed by Section 8283 of the Code as amended by General Acts 1936-37, p. 267.

2. A foreign insurance corporation not authorized to transact business in this state through legally commissioned agents, and who solicit and procure insurance business through the mails, would not be liable for the premium tax required to be paid by an individual who places insurance with such a corporation as provided for by Section 8373 of the Code.

3. A foreign insurance corporation becomes liable for a premium tax for insurance written in this state as provided for by schedule 160.4 of the 1935 Revenue Code when the foreign corporation makes an application to be authorized to do business in this state.

4. Payment of the premium tax by the foreign insurance company as provided for by schedule 160.4 of the 1935 Revenue Code absolves the company from the payment of penalties.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows: The insurance companies referred to in this request are the All State Fire Insurance Company and the All State Insurance Company (Casualty).

"The above companies have applied for admission to Alabama, meeting all of the necessary requirements of the laws.

"Among the requirements are the signing of an affidavit in accordance with an Amendment to the Acts per attached pamphlet.

"These Companies are operated as separate corporations but are advertised and perhaps controlled by Sears Roebuck & Company.

"In submitting their Annual Statement they show outstanding business in force in Alabama, that is to say insurance contracts covering risks in this State.

"The Company has not heretofore been qualified in this State. In submitting their statement and qualification papers it was disclosed that the Company had in force in this State the following:

"Fire Premiums to the amount of $13,030.32. Miscellaneous Casualty premiums in the amount of $13,941.79.

"It is the claim of the Company that these premiums were produced by mail and that, therefore, they should not be charged the usual premium tax thereon.

"By referring to Code Section 8373, you will note that any person that places insurance in foreign companies not authorized in the State will pay the tax named in the said section.

"Will you therefore please advise me —

"(1) Does the affidavit furnished by the Company to the effect that they have not written premiums over the heads of agents for the last twelve months subject this Company to the terms and penalties mentioned in Section 8380 of the Code as amended by the Act of the Legislature approved March 7, 1937?

"(2) If your answer to the above is in the negative would the Company be liable for the premium tax required to be paid by an individual as provided in the Code Section 8373.

"(3) Or would the Company by paying the premium tax provided by the present laws be absolved from penalties.

"(4) Under the current tax schedule premiums on the fire insurance in force in this State would amount to $57.66 and premiums on the miscellaneous casualty in force would amount to $384.54."

1. Your first inquiry must be answered in the negative. Sections 8379 and 8380, Code of Alabama, as amended by General Acts 1936-37, p. 267, provide as follows:

"Section 8379. FOREIGN COMPANIES DOING BUSINESS IN THIS STATE MUST CONTRACT THROUGH LOCAL AGENTS: EXCEPTION. All insurance companies, other than life insurance companies, not organized under the laws of this State, but legally authorized to do business in this State through regularly commissioned agents located in this State, shall make contracts of insurance on property or risks in this State only through agents of such companies regularly commissioned and duly licensed to write policies or contracts of insurance in this State; but this Article shall not apply to such companies covering the actual property of railroad companies doing directly a transportation business over its own line beyond the limits of this State."

"Section 8380. FOREIGN COMPANY APPLYING FOR LICENSE MUST FILE AFFIDAVIT SHOWING COMPLIANCE WITH PRECEDING SECTION. Before issuing certificate of license to any insurance company, other than life, to transact business in this State, The Superintendent of Insurance shall require in every case, in addition to the requirements already provided by law, that each and every such company shall file with him the affidavit of its president or other chief officer that it has not violated any of the provisions of this article for the space of twelve months last past, and that they accept the terms and obligations of this article as a part of the consideration of their license."

You will note that these sections appear under Article II, the heading of which reads: "Provisions for the Protection of Agents of Foreign Companies." Therefore, the sections of the Code appearing under this Article

apply to foreign insurance companies who have licensed agents within the state and are legally authorized to do business in this state through regularly commissioned agents located in the state. The companies referred to in your inquiry it appear, have never been qualified in this state, therefore, they could not have regularly commissioned agents located in this state. The fact that the two companies referred to did write insurance in the State of Alabama through the mails, does not bring them within the provisions of the Code sections contained in Article II, as above-noted. Therefore, an affidavit furnished by the company to the effect that they have not written premiums over the heads of agents for the last twelve months is merely a statement of fact and is not controverted by the mere fact that they did have some insurance in force in this state prior to the time they applied for the right to be legally authorized to write insurance in the State of Alabama.

Therefore, the companies referred to, viz., the All State Fire Insurance Company and the All State Insurance Company would not, under the facts as here presented, be liable for the penalties imposed by Section 8382 of the Code as amended by General Acts, 1936-37, p. 267.

2. Your second inquiry must be answered in the negative. Section 8373 of the Code provides as follows:

> "Section 8373. PERSONS PLACING INSURANCE WITH UNLICENSED FOREIGN COMPANY MUST REPORT TO INSURANCE COMMISSIONER AND PAY TAX ON GROSS PREMIUM; PENALTY, ETC. — Any person who may desire to place his insurance in foreign company not authorized to do business in this state may place such insurance, but the person placing such insurance shall at once make return of his action in this behalf to the insurance commissioner together with four percent on the gross premiums paid on the insurance so placed, and it shall be lawful under such contracts of insurance for any person to adjust a loss under same. Any person failing to report such insurance placed by him in an unauthorized company, and make payment of the tax named, within thirty days after date of receiving policy, shall be required to pay a tax of eight per cent."

You will note that this section provides a tax upon the person who places insurance in a foreign insurance company not authorized to do business in this state.

I do not at this time pass upon the constitutionality of Section 8373, although this section has been interpreted by the Supreme Court of Alabama to the effect that the object of the section was a collection of the revenue on the gross premiums paid on the insurance so secured. (Sales—**Davis Company vs. Henderson-Boyd Lumber Company,** 193 Ala. 166). It is my opinion that there is no liability on the companies for the tax imposed by Section 8373 of the code above-quoted. (**St. Louis Compress Company vs. Arkansas,** 260 U. S. 346).

3. The pertinent provision for the collection of a premium tax against a foreign insurance company not authorized to do business in this state is contained in Schedule 160.4 of the Revenue Code, p. 433 (Simon) which provides as follows:

"Schedule 160.4. Each FOREIGN FIRE OR MARINE OR FIRE AND MARINE INSURANCE COMPANY shall pay one and one-half dollars ($1.50) on each one hundred dollars ($100.00) and every other foreign company, including foreign life insurance companies, shall pay two dollars and fifty cents ($2.50) on each one hundred dollars ($100.00) of the gross premiums received by it or them for business done in this State, **whether the same are actually received by said company in this State or elsewhere,** during the year ending the thirty-first day of December preceding, less return premiums, as a privilege tax or license for doing business in this State during the current year. Provided that any foreign insurance company entering the State shall, on or before March first of the year succeeding the year of its entry, remit with its statement to the Superintendent of Insurance the taxes as required by the first of this section, on business written in Alabama for the preceding calendar year or fraction thereof in which it entered as a privilege or license tax for such first year or fractional year." (Italics supplied).

You will note that the above schedule is effective when the foreign insurance company makes an application for permission to do business in this state. Further, you will note that this schedule does not provide for the payment of any penalties. In the case of **Allgeyer vs. Louisiana,** 165 U. S. 583, the United States Supreme Court through Mr. Justice Peckham stated:

"There is no doubt of the power of the State to prohibit foreign insurance companies from doing business within its limits. The State can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions be complied with the prohibition may be absolute."

It is my opinion, therefore, that the companies paying the premium tax provided for by Schedule 160.4 of the Revenue Code (supra) are absolved from the payment of any penalties. You will note further that Schedule 160.4 above quoted provides that the tax upon premiums shall be paid whether the premiums are "actually received by said companies in this state or elsewhere."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 31, 1939.

Hon. C. E. McNatt, Clerk,
Law and Equity Court,
Russellville, Alabama.

Solicitor's fee — The Solicitor's fee prescribed by Section 3230, code of Alabama, 1923, for each conviction thereunder should be paid into the County Treasury in a like manner as Solicitor's fees prescribed by Section 3738, Code of Alabama, 1923.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your recent request for opinion as follows:

"We recently had a case tried in the Law & Equity Court against a defendant charged with selling a choking mule, under Section 3230 of the Code of 1923. This Section of the Code, after defining the offense and prescribing the punishment, has an additional sentence reading as follows: For each conviction under this Section the Solicitor shall be entitled to a fee of fifty dollars.

"It appears that all other Solicitors fees are prescribed by Section 3738 of the Code, and this last Section requires such fees as prescribed by it to be paid into the County Treasury.

"I have this Solicitor's fee in my hands, collected on the conviction under Section 3230, and am asking your opinion on this question.

"Should I pay this fee to the Solicitor of the Law & Equity Court of Franklin County as directed by Section 3230, or should I pay this fee into the County Treasury under Section 3738? This Section, 3738, does not prescribe a Solicitor's fee for a conviction under Section 3230. What effect does Section 33, Local Acts, 1923, page 272 have on it?

It is quite evident that you should pay this Solicitor's fee into your County Treasury. It is true that the closing sentence of section 3230 under which this fee was collected by you as Clerk, says: "For each conviction under this section the solicitor shall be entitled to a fee of fifty dollars," but nowhere does it say that this fee shall be paid to the solicitor in addition to any salary that he might receive, and the inference is clear that what the Legislature really intended was that a solicitor's fee of fifty dollars shall be taxed against each defendant convicted for a violation of that particular section.

A careful reading of the Act of the Legislature, Local Acts of 1923, page 272 and following, which said Act establishes the Law and Equity Court of Franklin County, and among other things fixes the salary of the Solicitor of said Court, at Twelve Hundred Dollars per year, payable One Hundred Dollars per month, makes it more apparent that it is your duty to pay this Solicitor's fee into your County Treasury, because the salary of the Solicitor is definitely fixed and circumscribed. He receives no fees, but a stipulated salary.

Section 33 of said Act is so explicit we think there could certainly be no other answer than the one given above, and is in words as follows:

"That there shall be taxed against the defendant on conviction the same solicitor's fee and the same shall be collected in the same way as provided by law for the taxing and collecting of solicitors fees in the Circuit Courts of Alabama and when collected the same shall be paid into the Treasury of Franklin County, Alabama."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 31, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

(1) Officer signing county warrants in payment of amount in excess of legal claim is liable under official bond for amount illegally paid out.

(2) Members of Board of Revenue or of County Commissioners liable under their official bond for auditing and allowing such a claim in an amount in excess of the amount due by the county, their liability being limited to any amount paid out illegally by reason of auditing and allowing such claim.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of inquiry wherein you request the following opinion:

"In checking Boards of Revenue or Courts of County Commissioners we often find errors in claims paid, such as errors in extention and errors in addition.

" 'Example'.

"100 feet of lumber at $18.50 per M $185.00

The correct extention should be ..... $ 1.85

Another claim will have four or five items that will add $20.30 when properly added, but the claim will read total $30.30.

"Under such conditions we charge back such errors.

"Will you please refer to Sections 179-324 and 7848-6793, Code of 1923, and Acts 1935, pages 803-808, and advise me as follows:

"1. Would the officer signing the warrant in payment of such claim be liable on his official bond for the amount illegally paid out?

"2. Would the members of the Board of Revenue or Court of County Commissioners be liable on their official bond for auditing and allowing such claims as to the amount illegally paid out?"

Your first inquiry is answered in the affirmative. Section 321 of the Code of Alabama, 1923, designating the officer whose duty it is to draw county warrants and sign the same as amended protants by Acts 1935, page 803, Section 5, imposes liability upon such officer in case of payment from county funds without authority of law. It provides in part:

J./2. 5.1-/

"Such officer signing such warrants shall be liable for the amount of any warrant drawn and paid by such depository without authority of law."

This section has been interpreted as applying, although the claim for which warrant is drawn has been audited and allowed by the Commissioners Court or Board of Revenue; and to render the officer drawing the warrant liable on his official bond if the payment is one without authority of law. See Quarterly Report of Attorney General, Vol. XI, page 91.

Your second inquiry is also answered in the affirmative.

In auditing and allowing claims against counties, the County Commissioners act in an administrative capacity, and the allowance of such claim is not an exercise of judicial power. **U. S. Fidelity & Guaranty Co. v. Cherokee County**, 156 So. 777, 26 Ala. App. 196. (Cert. Den) 156 So. 777, 229 Ala. 301. In the last cited case the matter of auditing and allowing claims is dealt with as follows:

"In auditing and allowing claims against the County, its Commissioners act in an administrative capacity only, and such allowance is only prima facie evidence either of the correctness of the claim or of the County's liability to pay it, and if the claim is not properly chargeable to the County, its allowance is void * * * ."

The act of auditing and allowing the claim being an administrative one, and the act being negligent in case the claim allowed is in excess of the amount properly chargeable to the county, in my opinion, the members of the Board of Revenue, whose negligent administrative act is responsible for the illegal paying out of county funds, are liable under their bonds for the amount so illegally paid out.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 31, 1939.

Hon. J. Fred Gurley,
Tax Collector,
Calhoun County,
Anniston, Alabama.

Taxation—Exemptions—

Resolution of county governing body exempting certain corporation, which was incorporated December 8, 1932, from county taxes for five years from December 8, 1932, covered an exemption of taxes payable October 1st of the years 1934, 1935, 1936, 1937 and 1938.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of January 4, 1939, which is as follows:

"I am enclosing a copy of a resolution approved by the Board of Revenue of Calhoun County, Ala., December 12, 1932.

"Emory Pipe and Foundry Company, Inc. was given an exemption from payment of county tax because of this resolution for the years 1934-35-36-37. They claim it for 1938. County Tax only.

"Mr. Sanders audited my accounts for 1935. He made a notation on the minutes of the county of December 12, 1932 that the Emory Pipe and Foundry Company, Inc. would be exempted from county tax for 1936 and 1937. The County Attorney, Mr. R. E. Jones, was with him at the time.

"Please give me your opinion on the exemption of county tax only for 1938."

The enclosed resolution approved by the Board of Revenue of Calhoun County on December 12, 1932, shows that the corporation in question was organized on December 8, 1932. The resolution concludes as follows:

"NOW, THEREFORE, BE IT RESOLVED by the Board of Revenue of Calhoun County, Alabama, that the said Emory Pipe & Foundry Company, Inc., be and it is hereby exempted from all taxes assessable against the said property for county purposes for a period of five years from; to-wit, the 8th day of December, 1932; that the said exemption shall expire on the 8th day of December, 1937."

In answer to your inquiry, I am of the opinion that the corporation would be exempt from the county tax payable October 1, 1938.

The exemption in question was for five years from, to-wit; from the 8th day of December, 1932, and expiring the 8th day of December, 1937.

Taxes in Alabama are assessable and the lien attaches as of October 1st of one year and are payable as of October 1st of the succeeding year. One who owns taxable property at the beginning of a tax year is liable for ad valorem tax on it for that year. **In Re Opinion of the Justices,** 234 Ala. 358, 175 So. 690; **State v. Alabama Educational Foundation,** 231 Ala. 11, 163 So. 527.

Applying the above rule to the instant case, it follows that the property of the corporation was not assessable by it until October 1, 1933. The corporation did not come into being until December 8, 1932. Taxes based on the 1933 assessment were not due to be paid until October 1, 1934. The exemption granted was for five years, which of necessity began with the taxes assessable October 1, 1935 and payable October 1, 1934. Therefore, it would be exempt from county taxes payable October 1st of the years 1934, 1935, 1936, 1937 and 1938.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 1, 1939.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Taxation—Redemption—

Mortgage holder of record, who has received no notice from purchaser at tax sale or his assignee, not entitled to redeem through Probate Judge when land has been sold or assigned after three years period of redemption has expired. However, he may institute proper legal proceedings to perfect redemption.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of recent date which is as follows:

"Referring further to your letter of June 24, 1938, in reply to my letter of February 24, 1938, relative to redemption of land sold for taxes prior to January 1, 1935, and bid in by the State:

"Under the facts involved, a mortgagee having a mortgage duly recorded at the time of the tax sale is seeking to redeem the land which was sold by the State Land Commission to a third party (a stranger to the title) on September 24, 1937. As stated in our former letter, said mortgagee made application for redemption before January 1, 1938.

"Act number 81, approved February 3, 1937, (General Acts, 1936-37, page 91) provides that whenever any real estate has, prior to January 1, 1935, been sold for taxes and bid in by the State, the same may be redeemed in the same manner as heretofore provided for sales made after January 1, 1935, 'except that the following additional provision shall apply: All persons having a right to redeem, such redemption shall be made as in other cases, except that the party desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties'; and shall, before January 1, 1938, make application to redeem and deposit with the Probate Judge one-fourth of the amount of accrued taxes, and annually thereafter one-fourth of said sum to the Probate Judge until the whole amount has been paid, 'and thereupon certificate of redemption shall be issued as in other cases'.

"In the instant case the mortgagee is seeking to redeem the property involved on the ground that it has received no written notice from the purchaser at the tax sale. The statute makes no provision as to how the fact shall be ascertained that no written notice was given and makes no provision for notice to the present holder of the tax title.

"Under the facts involved, please advise whether or not the mortgagee may redeem through this office, and if so, the method in which such redemption may be effected so as to be binding upon the present holder of the tax title.

"Said Act further provides that all laws and parts of laws in conflict with the provisions of said Act are expressly repealed."

Under the facts stated in your letter of June 24, 1938, the land in question was sold to the State for 1932 taxes on November 20, 1933 and in turn conveyed by the State Land Commissioner to a third party (a stranger to the title) on September 24, 1937, practically four years after the original sale. In the opinion rendered you under date of June 24, 1938, it was held that Act No. 81 H. 259 approved February 3, 1937 (Senate 1936-37 p. 91) applies only when the State had not parted with its title. Said opinion further stated that the provision of Acts 1935, p. 1112, which protects the rights of the holder of a recorded mortgage, were not nullified.

The question presented by your inquiry pertains to the duties of the Probate Judge in regard to redemption by a mortgage holder of record, who alleges he has received no notice from the State, the purchaser at the tax sale, or its assignee. It will here be noted that the sale by the State Land Commissioner to the third party was not made until nearly four years after the tax sale.

Our Supreme Court in the case of **Alabama Mineral Land Co. v. McFry, et al.** 184 So. 192, in construing Section 3109 of the Code of 1923, which is similar to Acts 1935, p. 1112, states as follows:

"Nothing in Section 3109 looks to a postponement of the date for executing the tax deed. The Judge of Probate is not required to examine mortgage records, nor is any kind of record evidence of the giving of the notice under Sec. 3109 provided for. So far as appears, the Judge of Probate is governed by the state of his own records in executing tax deeds."

It will be seen from the above that the Judge of Probate is not required to go beyond his own records. The fact that notice has been or has not been given will not appear on his records. Moreover, he is not required to examine mortgage records. In other words, after the three year period of redemption has expired, he must execute a tax deed under Sec. 241 of the Revenue Acts of 1935, in accordance with the provisions thereof. After this is done, he has no further duties in the premises. The remedy of a mortgage holder of record, who has received no notice from the purchaser at the tax sale or his assignee, is to institute proper court proceedings.

The same reasoning in the foregoing paragraph is applicable when land has been bid in by the State and sold or assigned by the State, through the State Land Commissioner under Section 281 and 282 of the Revenue Act of 1935, more than three years after the tax sale.

The premises considered, it follows that, under the facts set out in your inquiry, you cannot allow the redemption sought. The mortgage holder of record in question may institute proper court proceedings to effect his redemption. (See Quarterly Report of Attorney General Vol. IV, page 130.)

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 1, 1939.

Hon. G. H. Howard,
Probate Judge,
Elmore County,
Wetumpka, Alabama.

Licenses—Automobile dealers: An automobile dealer doing business in more than one county must procure a State and county license in each county in which he does business.

A State license issued under Act No. 163, General Acts of Alabama, 1936-37, cannot be transferred from one county to another in view of Subsection (a) of Section 350, General Acts of Alabama, 1935.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge your letter of December 31, 1938, which is as follows:

"Please advise us on the following:

"In October this year an automobile concern bought State and county license in Dallas County. They have now sold this business and are opening up in Elmore County and have moved all cars to this location, however, they are still in the Auto Accessories and Parts business in Dallas County. Can we issue this concern county license only or will we have to sell them State and county license? Can this State license be transferred to this county?"

It is my opinion that you cannot issue the automobile concern in question a county license only, but it must procure a State and county license to do business in Elmore County.

This office has ruled that, under Schedule 12 of Section 348, General Acts of Alabama, 1935, page 445, an automobile dealer is liable for both State and county license **in each county in which he maintains an established place of business.** Schedule 12 of Section 348, was amended by Act No. 163, General Acts of Alabama, 1936-37, page 186, but said amendment did not alter the phase of said Schedule 12 of Section 348, dealt with in the opinion referred to above.

In answer to your second question, it is my conclusion that there is no provision in the Revenue Laws which permits such State license to be transferred from one county to another.

Subsection (a) of Section 350, General Acts of Alabama, 1935, is as follows:

"Whenever a license is levied in this Act, there shall be collected both a State and County license for each place of business, except as specifically otherwise provided."

There is no provision for the transfer of the State license from one county to another prescribed in Schedule 12 of Section 348, supra, therefore, it is my opinion that same cannot be done.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 1, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Probate Judges—Entitled to 2½c per name for each name on the alphabetical list of registered electors in the county, which he is required to prepare annually, a copy of which is certified to the Secretary of State.

License Inspector—Entitled to citation fee only when the citation to delinquent was made by personal service.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 11, 1939, which follows:

"It has been held by your office that the Probate Judge is entitled to 2½c per name for reporting to the Secretary of State a list of registered voters of the county each year. Please advise me if this compensation may be collected on the entire list of registered voters in the county each year, or whether the Probate Judge is entitled to this 2½c per name for reporting the new registrants only each year.

"Also advise whether or not the Probate Judge should collect citation fees on delinquent Automobile and General license without a certificate from the License Inspector that citation was served in person."

FIRST PART BEING RECONSIDERED—DO NOT FOLLOW.

The opinion of this office holding that Probate Judges are entitled to 2½c per name for making alphabetical list of registered electors of the county, a copy of which must be furnished the Secretary of State, annually, was rendered to Hon. Charles W. Lee, State Comptroller, Capitol, under date of August 23, 1937, and is found in Quarterly Report of Attorney General, Vol. VIII, page 198. In that opinion, we quoted Section 187 of the Constitution and Section 401 of the Code of Alabama, 1923, and the pertinent part of Section 7285 of the Code of Alabama, 1923, which is the applicable law of the State of Alabama on this subject.

In making an alphabetical list of registered electors of the county annually, a copy of which must be certified to the Secretary of State, in accordance with the above cited provisions of the law, the Probate Judge must not only add to the last list the names of those persons who have registered as electors since the time of the preparation of the last list, but he must also delete from the last list the names of all those registered electors appearing thereon whose names have been purged therefrom by the Board of Registrars because of death, removal of residence, conviction for crime, or any of the other cases for which registered electors' names should be removed from the list. Therefore, it is necessary for him to revise the whole list annually, and it seems very clear that he would be entitled to the 2½c per name, which is the fee provided for this service by Section 7285, supra, for each name appearing on the alphabetical list of registered electors in the county, a copy of which he must certify to the secretary of State, each time he prepares such list, and I so advise you.

That a License Inspector is not entitled to the citation fee for citation to persons who are delinquent in paying motor vehicle or privilege licenses unless the citation was by personal service has been settled by previous opinions of this office for many years. For your information and official guidance on this matter, we respectfully refer you to the following opinions of the Attorney General: Opinion to Judge of Probate, Franklin County, Russellville, Alabama, under date of November 28, 1930, Biennial Report of Attorney General, 1930-32, page 31, and opinion to Hon. G. L. Malone, Judge of Probate, DeKalb County, Fort Payne, Alabama, under date of June 9, 1931, Biennial Report of Attorney General, 1930-32, page 309. In those opinions this subject is dealt with in detail and numerous authorities are cited in support of the conclusions reached therein, viz., that the License Inspector is only entitled to the citation fee when citation on the delinquent has been made by personal service. While the present applicable law on the subject of citation of delinquents in the payment of motor vehicle and privilege licenses is found in the 1935 Revenue Act instead of in the statutes referred to in those opinions, which were the then applicable statutes on this subject, the provisions in the 1935 Revenue Act in this regard are in all material respects the same as were the provisions in the statutes that were applicable at the time the above-cited opinions were written. Therefore, the holdings announced therein are here and now reaffirmed, and you are advised that the License Inspector is not entitled to collect the citation fee unless his citation to delinquents in the payment of motor vehicle and privilege licenses was by personal service.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 1, 1939.

Hon. John C. Curry,
Chairman, State Tax Commission,
Capitol.

Securities—Under facts stated, executor of an estate not required to list and pay taxes on securities. The beneficiaries of the estate should list and pay taxes on the securities on the 1st day of October following the transfer to them.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date which is as follows:

"It will be appreciated if you will give us an opinion on the following question:

"'An owner of foreign securities properly filed a list and paid the tax due on these securities as of October 1, 1937. In the Spring of 1938, the owner died, and on October 1, 1938 these same securities were held by the Executor of the Estate. The Administration of the Estate will probably be closed within the next few months, and by October 1, 1939, the securities will be held by the beneficiaries under the terms of the will. the question is, should the Executor again list and pay taxes on the same securities as of October 1, 1938? Also, should the beneficiaries list and pay taxes on these securities for 1939?'"

In my opinion, it will not be necessary for the executor of the estate to list the foreign securities and pay taxes on the same as of October 1, 1938. Of course, if the securities are transferred to the beneficiaries, then they will be the owners and it will be necessary for them to file the securities for registration on the 1st day of October following the receipt of the same.

Act No. 88, H. 34, approved February 12, 1937 (General Acts of 1936-37, Extra Session, page 105) provides in part as follows:

"Any owner of any securities enumerated in the preceding section may, as of the first day of October, 1937, and thereafter as to securities subsequently acquired from time to time as of the first day of October next, following the date of acquisition, record the fact of his ownership thereof in the office of the State Tax Commission of Alabama, * * * (b) Upon the filing for record in the office of the State Tax Commission of any such list of securities, the owner of the securities listed therein or his agent, shall present said list to the State Tax Commission and pay to the State Tax Commission the amount of tax required under this Section to be paid on account thereof, and upon such payment, the State Tax Commission, or any member thereof, or any of its assistants, shall certify on said list of securities the fact that the tax has been paid, and the owner shall not thereafter be required to list or pay taxes on said securities."

In **Norris v. Commercial National Bank of Anniston,** 231 Ala. 204, 163 So. 798, our Supreme Court said:

> "It is true that upon the appointment of the executor, after the probate of the will, the title to all personal property of the testator vested, for the purpose of the administration of the estate, in the personal representative, * * *"

In my opinion, the executor of the estate is not the owner of the securities so as to come under Act No. 88 supra as he is holding the securities only for the purpose of administrating the estate and it may be necessary to sell the securities to pay the decedent's debts.

In the administration of the estate, if the securities are transferred to the beneficiaries, then they become the owners of the securities and should file the securities for registration on the 1st day of October following the transfer to them.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 1, 1939.

Hon. J. C. Grady,
Judge of Probate,
Chambers County,
Lafayette, Alabama.

Counties—Gasoline tax—Issuance of interest-bearing warrants—

Under authority of Section 1397 (110) of Michie's Code of 1928, county governing bodies may issue interest-bearing warrants, not general obligations of the county, payable, in not exceeding ten years, from the county's anticipated receipts of State Excise Tax on gasoline, to obtain funds to be used in the construction and maintenance of county roads and bridges.

Under authority of Acts, Extra Session, 1936, page 28 and Section 1397 (110) of Michie's Code of 1928, county governing bodies may issue interest-bearing warrants, not general obligations of the county, payable, in not exceeding ten years, from the county's anticipated receipts of State Excise Tax on gasoline, to pay valid outstanding claims incurred in the year 1938, on account of the construction and maintenance of public roads and bridges.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Claims for materials furnished to the County for use in the construction and maintenance of public roads and public bridges in the amount of approximately $55,000.00 have accumulated during 1938 and been presented as claims against the County; these claims have been audited and allowed, but no warrants have been issued.

"It is the desire of the Court of County Commissioners to issue warrants payable out of the Gasoline Funds received from the State, to be repayable over a period of three years, in order to obtain funds with which to pay these claims that have been allowed against the County, and also to obtain a sum of approximately $5,000.00 to be used for the future purchase of machinery that will be needed for construction and maintenance of public roads.

"In your opinion does the County have authority to borrow money by the issuance of these Gasoline Tax Warrants, and to use the money for the payment of these accumulated debts and in the purchase of new machinery for use in the construction and maintenance of roads?"

For convenience, the two questions involved will be transposed, for the purpose of advising you upon the same. Your second question, viz: Whether or not the county governing body of Chambers County may issue interest-bearing warrants (which are not general obligations of the county), payable over a period of three years, and pledge the county's share of the State Gasoline Excise Tax for the payment thereof, to obtain $5,000.00 for the purchase of necessary road machinery, must be answered in the affirmative.

Section 1397 (110) of Michie's Code of 1928 vests in the county governing bodies general superintendence of the public roads and bridges within their respective counties; and as to such works, county governing bodies are made courts of unlimited jurisdiction and powers, except as specifically restricted by statute. In part it provides:

"They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten year."

In **Herbert v. Perry et al,** 235 Ala. 71, decided in December, 1937, a declaratory judgment suit was brought to determine whether the governing body of Marengo County had the power and authority to issue interest-bearing county warrants payable out of the Gasoline Excise Tax derived monthly from the State. In disposing of the question, the Supreme Court said:

"When the several statutes touching the question for decision are considered, it is noted that they are to the effect (1) that the county gas taxes from the state must be used for construction, improvement, maintenance, and supervision of public highways, bridges, and the retirement of bonds issued to that end and for no other purpose (General Acts of Alabama, 1935, pp. 441, 511, Section 348, Schedule 156.9 and General Acts

of Alabama 1936-37, Ex. Sess. p. 280; and analogy found in Houston County v. Covington et al, 233 Ala. 606, 172 So. 882); and (2) the county may expend not exceeding one-third of the amount received from the State from any tax on gasoline for the payment of any debt that may have been theretofore incurred by it in construction of county roads and bridges (General Acts of Alabama 1936, Ex. Sess., pp. 28, 29, and General Acts of Alabama 1932, Ex. Sess., p. 225 et seq.).

"We have indicated that the county's power to make contracts is unlimited for the maintenance and construction of public roads and bridges, within the county; except such contracts shall not exceed the periods of time fixed,—ten to twenty years—according to the class within which the county may be, as defined by the General Acts of Alabama 1927, pp. 348, 391, Section 157.

"Under these statutes counties may issue interest-bearing warrants to road contractors for such work maturing within the period prescribed in the statutes." Citing cases.

So that, it is authoritatively settled that the counties in Alabama may issue interest-bearing warrants, payable solely from the funds derived by the county from the State Excise Tax on gasoline, and pledge the anticipated receipts therefrom for the payment thereof.

The provisions of Acts 1935, page 231, have been considered by me in arriving at this conclusion, but said provisions are not applicable to your situation for the reason that, whether Chambers County comes within the classification therein laid down or not, the warrants which Chambers County proposes to issue fall within the ten year period provided by Section 1397 (110) of Michie's Code, as well as the twenty year period provided by the 1935 Act, supra.

Your second inquiry, viz: Whether or not the county may issue interest-bearing warrants payable solely from the State Excise Tax on gasoline received by the county and pledge the anticipated receipts therefrom for the payment thereof to obtain funds to pay claims accumulated in the year 1938 on account of construction and maintenance of public roads and bridges, must, in my opinion, also be answered in the affirmative. This question involves the proper construction of Act No. 51, Acts of 1936, page 28. It provides:

"Section 1. The Board of Revenue or Court of County Commissioners or other governing body of each and every county in Alabama is hereby authorized and empowered to expend an amount not to exceed one-third of the total amount that may be received by each county from the levy and collection of any tax on gasoline in the payment of any debt that may have been heretofore incurred by such county for the construction and/or maintenance of roads or bridges."

You will note that the Act provides that county governing bodies are empowered to expend an amount not to exceed one-third of the total amount that may be received by each county by the levy or collection of any tax on gasoline "in the payment of any debt that may have been **heretofore** incurred by such county for the construction and/or maintenance of roads or bridges."

The Act was approved March 26, 1936, and provided that it shall be effective upon its passage and approval. A casual reading would indicate that the legislative intention was that the pledging of one-third of the anticipated State Excise Tax on gasoline to be received by the county for the payment of antecedent debts was limited to those debts in existence at the time of the approval of the Act, that is to say, March 26, 1936. However, the Supreme Court in the Herbert case, supra, applied to the Act a different construction. There it was said: "The county may expend not exceeding one-third of the amount received from the State from any tax on gasoline for the payment of any debt that may have been theretofore incurred by it in the construction of county roads and bridges." The Supreme Court construed the phrase "any debt that may have been heretofore incurred by such county" to mean "any debt incurred before the passage of the resolution of the county governing body authorizing the issuance of the warrants." This is clear to my mind, for the reason that the matters under consideration in the Herbert case were since the approval date (March 26, 1936) of the 1936 Act, supra.

Upon the basis of this authority, I conclude that the county governing body of Chambers County may issue interest-bearing warrants, not general obligations of the county, payable over a period of three years, and may pledge the county's anticipated receipts from the State Gasoline Excise Tax for the payment thereof, in order to pay the accumulated claims for road and bridge purposes for the year 1938, provided that the amount necessary to pay said warrants and interest over said period of three years does not exceed one-third of the total amount which is to be received by said county during this period.

This office heretofore has dealt with some phases of the questions here involved in former opinions appearing in Quarterly Reports, Vol. II, p. 124; Vol. III, p. 500; Vol. IV, p. 73; Vol. V, p. 32; Vol. X, p. 60 and Vol. X, p. 176. In some of these opinions there appear expressions which lead to the conclusion that the 1936 Act, supra, authorizes the setting aside of one-third of the county's anticipated receipts from the State Excise Tax on gasoline for the payment of interest-bearing warrants issued against said funds, only as to debts and obligations contracted prior to the approval date of said Act, that is to say, March 26, 1936. In some of the opinions there was involved only the question of the right of the county governing body to issue such warrants for the purpose of paying debts and obligations incurred prior to the approval date of said Act, and the pronouncements are correct as applied to the facts dealt with. However, in the interest of accuracy, all such expressions in said opinions are hereby modified to conform to the conclusion here announced.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 1, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Taxation—Tax Sales—Assessment for ad valorem taxes—Powers of the Board of Review—Limitation of actions.

1. Collecting authorities must levy on property in order to sell the same for delinquent taxes, within five years of the date of delinquency, or if appealed to the courts, within five years of final judgment.

2. In a case where a taxpayer duly protests assessment and appeals from the decision of the Board of Review making assessment final, and the appeal is not heard until expiration of the next succeeding tax year, the judgment of the court fixing the value for the first year has no bearing whatever upon the determination made by the Board of Review for the succeeding year; and, in the absence of protest filed within the time provided by law, the Board of Review is without authority or jurisdiction to reopen the assessment for said succeeding year for the purpose of making the values the same as those determined by the court for the preceding year.

3. Actions by the State for the collection of taxes legally assessed must be brought within five years of the date of delinquency.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Will you please give me your written opinion regarding the following legal questions relative to the assessment and collection of ad valorem taxes under the laws of Alabama:

"1. If ad valorem taxes assessed several years ago were allowed to the Tax Collector as 'Insolvent' or 'In Litigation' in his settlements with the State, County and School authorities, and the litigation pending when such allowances 'In Litigation' were made has since been terminated, are still due and unpaid by the taxpayers, has the Tax Collector authority now to levy on and sell any property he may find which belongs to the delinquent taxpayers for the purpose of collecting such taxes, in the same manner that he would proceed to levy on and sell property of the taxpayer for collection of taxes regularly assessed during the preceding year which are collectible during the current year? In other words, is there any legal time limit on the authority of the Tax Collector to levy on and sell property of a taxpayer for taxes which have been legally assessed?

"2. In case appeal was legally taken to the Circuit Court from the final decision of the Board of Review fixing the assessed valuation of a parcel of real estate, and the judgment in the case, which was not rendered until after the close of the following tax year, reduced the assessed valuation fixed by the Board of Review; and in the meantime the assessed valuation on the same property for the second tax year had been made final by the Board of Review for the same amount fixed by it for the first year, and no appeal was taken from such valuation to the Circuit Court within the time allowed by law; was it legal for the Tax Collector, with the approval of the Board of Review, and the subsequent approval of the County Commission or governing body to allow to the taxpayer as

an error in the assessment for the second year the amount of the tax computed upon the difference between the valuation made final by the Board of Review for the second year and the amount fixed by the judgment of the Circuit Court for the first year? Does the authority of the Board of Review or of the State Tax Commission to raise or lower the assessed valuation of property for a particular tax year in any event extend beyond the end of that tax year? Has the Tax Collector authority under the law to make an allowance as an error in assessment under the circumstances and for the reasons stated above?

"3. Is there a legal limitation in the laws of this State upon the time within which suit may be brought to collect taxes which have been legally assessed? If so, when does the statute begin to run against the State?"

Answering your first inquiry, in my opinion, proceedings for the collection of ad valorem taxes legally assessed must be begun within five years of the date upon which the same became delinquent; or in the event of review by the courts, within five years of final judgment.

Sections 8941 and 8945 of the Code of 1923, provide:

"8941. Limitation of action.—All other civil actions must be commenced after the cause of action has accrued within the period prescribed in this Code, and not afterwards."

"8945. Limitation of five years.—Within five years —. * * *

"2. All actions by the state or any subdivision thereof for the recovery of amounts claimed for licenses, franchise taxes, or other taxes."

Although the Statute of Limitations, supra, is directed to "civil actions", it is my judgment that this, together with the provisions of law limiting to five years the time for the assessment and collection of taxes on property which has escaped from taxation, evince the legislative intention to set at rest claims of the State or any of its subdivisions for taxes and withdraw any remedy for their enforcement after five years from the delinquent date thereof. Cf. **Bradford v. City of Huntsville,** 215 Ala. 591; **State v. Acacia Mutual Life Ins. Co.,** 214 Ala. 629.

Answering your second inquiry, in my opinion neither the Board of Review nor the State Tax Commission has authority to reopen an assessment for ad valorem taxes, in any event, after the delinquent date of the taxes levied by said assessment.

As I understand the facts stated in your request, an assessment was made for a given tax year; the taxpayer protested, the Board of Review made the assessment final; and the taxpayer duly appealed to the courts for relief. That before the determination of the appeal another assessment was made for the next succeeding tax year, and was confirmed by the Board of Review; and that the taxpayer neither made protest nor took an appeal from the action of the Board of Review in making the assessment final. That subsequently the court ruled on the appeal and reduced the assessment, and therefore the taxes due, for the prior year; and that the Board of Review, after the close of the succeeding tax year, reopened the assessment for the

succeeding year in order to make the assessment for that year the same as that determined upon by the court on the appeal for the preceding year.

Such procedure is beyond and without the authority of the Board of Review, or of the State Tax Commission. See subsection (b) of Section 93, Revenue Act of 1935 (General Acts, 1935, page 299)".

In **Daffin v. Scotch Lumber Company,** 226 Ala. 33, the court considered a similar situation. There the taxpayer had listed its lands for taxation; the Board of Review made alterations in the assessment and fixed values thereof to make the same final; no protest was filed by the taxpayer within the time then provided by law, but such a protest was filed within the tax year. The Board of Review convened for the purpose of hearing the protest, and upon the hearing set aside its former assessment and acceded to the objections of the taxpayer. The Tax Assessor declined to enter the assessment, as amended by the Board of Review at such an irregular session, upon the tax records of the county, and insisted upon making the assessment upon the original determination of values made by the Board of Review. The taxpayer applied for mandamus to the Tax Assessor to require him to enter upon the tax records the substituted assessment made by the Board of Review.

Speaking to the question, the court said:

> "The jurisdiction and power conferred by said Section 57 is judicial, and is limited to 'hearing objections filed in writing to any assessments or valuations fixed as provided' in the act, and it is familiar law that 'Conditions precedent to a statutory review by an officer or board must, of course, be complied with. Whatever may be the relief sought, the party applying for it must comply strictly with the provisions of the statute which confers the right.'
>
> "The petition for the writ of mandamus clearly shows that the objection to the assessment was not filed on or before the last Monday in May, and, unless the statute contains an exception to this limitation on the taxpayer's right of review, and the petitioner's case falls within the exception, the proceedings of the board were coram non judice and void."

Section 74, et seq. of the Revenue Act of 1935 provide conditions precedent to relief to a taxpayer who is aggrieved at the assessment fixed against the property.

When the Board of Review sits to examine tax returns and assessments certified to it by the county Tax Assessor, it proceeds to value and equalize the property encompassed in each assessment. By Section 74 notice is required to be published of the fact that the Board of Review has fixed assessments against property within the county, and that the valuations made are on file in the office of the Tax Assessor and open for public inspection, and that the Board of Review will hold sessions at the county courthouse on the first Monday in June to consider such protests as may be filed by taxpayers on or before the last Monday in April. Section 75 provides the procedure upon such hearings. Section 76 provides for the determination, after hearing of the objections, of the values and making the assessments final.

Section 77 provides:

"In cases where objection has been made by any taxpayer, his agent or attorney, as provided herein to the taxable value fixed by the Board of Review, or any property assessed against such taxpayer, and such objections have been over-ruled by said board, such taxpayer, his agent or attorney, may take an appeal from the action of said board in overruling his objection, to such valuation, to the circuit court of the county in which the taxpayer's property is located."

Section 78 provides that appeals from rulings of the Board of Review fixing value of property shall be taken within thirty days after final decisions of said Board fixing said value by filing notice of appeal with the Secretary of the Board and with the Clerk of the Circuit Court, and filing bond with the Clerk of the Court conditioned to pay all the costs, etc.

Under the facts stated in your inquiry, none of these conditions precedent were complied with by the taxpayer as to the tax year subsequent to the appeal.

Therefore, the Board of Review was wholly without jurisdiction to reopen the assessment or to alter the same in any manner.

Your third inquiry is answered by Subsection 2 of Section 8945 of the Code of 1923, quoted supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 3, 1939.

Hon. Frank T. Herlong,
Tax Assessor, Butler County,
Greenville, Alabama.

Taxation—Real and personal property of St. Teresa's Village, used exclusively for religious worship, for schools and for purposes purely charitable, is exempt from ad valorem taxation under Section 2 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date with enclosures which state:

"We are the owners of the following described real estate situated in Butler County, Alabama, viz: The West half of NE¼ and the East half of NW¼ of Section Twenty (20), Township Nine (9), Range Fourteen (14), being One Hundred and Sixty (160) acres, more or less, and of

certain personal property consisting mainly of live stock, farm vehicles, and farm implements which are used in connection with the operation of said lands.

"For your information, St. Teresa's Village is an incorporated, charitable, educational and religious association. A copy of the resolution which was adopted by the Incorporators and a copy of the Certificate of Incorporation are attached hereunto as exhibits to this letter.

"The funds with which the real and personal properties hereinabove described were purchased and all other funds belonging to the Corporation, were borrowed from the Bureau of Catholic Charities of the Diocese of Mobile, Alabama, or were received as free will offerings. The Corporation and the property owned by it are under the management of Rev. A. W. Terminiello, Director of Rural Life of the Diocese of Mobile, Alabama, who resides upon the property and will be pastor of the church that is now being erected thereon. The church will be completed and dedicated by April 1, 1939. A school will be erected and operated upon the property within a year and at the same time a convent will be erected as living quarters for the teachers.

"At the present time the colony consists of seven families who were indigent at the time they were selected by Rev. A. W. Terminiello. Some of these families are Catholic and some are not. Some are white, and some are colored. It is the purpose and intention of the officers and members of the Corporation that additional families be selected and added to the colony from time to time.

"The residents of the colony will cultivate the lands hereinabove described. As much as is needed of their produce will be used to support the members of the colony, and the surplus, if any, will be marketed by the Corporation and the proceeds will go into the general fund of the Corporation. Any profits that may accrue will be used for expanding the colony. No profits will be paid to the officers or members of the Corporation, or members of the colony, or to anybody else. None of the property, real or personal, owned by the Corporation will be let for rent, or hire or for use for business purposes, but on the contrary, all of said property will be used exclusively for religious worship, for schools, and for purposes purely charitable.

"The premises considered, the undersigned respectfully claims exempt from ad valorem taxation, the real and personal property hereinabove described, as is provided in Section No. 3022 of the 1923 Code of Alabama."

The certificate of incorporation provides in part as follows:

"Know by these presents, that the undersigned desire to become a body corporate under Section 7167 of the Code of Alabama, 1923, for the sole purpose of establishing a charitable, educational, religious and non-profit earning institution to provide for indigent members of the Roman Catholic Church in the State of Alabama and others, and to that end do they hereby make and subscribe their names to this certificate. * * *"

You request my opinion, if this property is exempt from ad valorem taxation.

In my opinion your question should be answered in the affirmative.

Section 2 of the 1935 Revenue Act provides in part as follows:

> "* * * all property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, owned by any educational religious or charitable institution, society or corporation, let for rent or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or charitable purposes; * * *"

Our Supreme Court in construing Section 3022 of the 1923 Code of Alabama, the provisions of which were similar to Section 2 of the 1935 Revenue Act, supra, held that the use of the property was the criterion in determining the exemption and not the ownership or the application of the income from the property.

State v. Alabama Educational Foundation, 231 Ala. p. 11, 163 So. p. 527;

Gay et al v. State, 228 Ala. 253, 153 So. 767;

State et al v. Church of Advent, 208 Ala. 632, 95 So. 3;

Anniston City Land Co. v. State, 160 Ala. 253, 48 So. 659.

See also:

Quarterly Report of the Attorney General, Vol. IX, page 122; Quarterly Report of the Attorney General, Vol. VI, page 72; Quarterly Report of Attorney General, Vol. III, page 155; Biennial Report of Attorney General, 1918-20, pp. 393 and 596.

The test of exemption is based upon the determination of the question of fact in each individual case as to the use of the property. It is my opinion from the facts as stated in the letter you enclosed with your request, that the real and personal property of St. Teresa's Village is used exclusively for religious worship, for schools and for purposes purely charitable and is therefore exempt from the payment of ad valorem taxes under Section 2 of the 1935 Revenue Act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 4, 1939.

Hon. Grady R. Williams,
Judge of Probate,
Lauderdale County,
Florence, Alabama

Licenses——Person who repairs Frigidaires, but does not have a shop is not liable for a license under Schedule 56 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your letter of recent date which is as follows:

"Will you kindly advise me whether Mr. A. S. Call should be required to pay a license under Schedule 56 of General Revenue Act of 1935.

"Mr. Call does not have or maintain a shop, or other place of business. He does not carry on hand any stock of supplies. He maintains a telephone in his residence and owns a truck on which are printed the words:

"'A. S. Call, Frigidair Service. Telephone No. 315.'

"He uses the truck to haul his tools from his home to wherever he may be called to repair an electric refrigerator. He sells nothing but his services but, the repair on which he is called requires some new part, then he purchases such new part for the owner of the refrigerator."

In my opinion, your question should be answered in the negative. Schedule 56 of the 1935 Revenue Act provides in part as follows:

"For each dealer in electric, gas or other mechanical REFRIGERATORS, electric or gas HEATERS, electric or gas WATER HEATERS, electric or gas STOVES, and/or for each electrical or gas repair, or electrical or gas SUPPLY SHOP: * * *"

The facts set out in your letter do not bring the case within the definition of a "shop" as laid down in the case of **Sparrenberger vs. State,** 53 Ala. 481, where it was said:

"We speak of 'shops' as a place in which mechanics pursue their trade, as a carpenter's shop, a blacksmith's shop or a shoemaker's shop."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 4, 1939.

Hon. Homer F. Mitchell,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Filing Tax—

1. A lease sale contract, whereby the lessor sells to lessee certain real estate for sum of money to be paid in installments, and lessor

agrees to execute warranty deed upon payment of final installment, is subject to a deed tax on cash payment, and a mortgage tax on the remainder.

2. Filling station lease subject to filing tax under Schedule 46 of Section 348, General Acts of Alabama, 1935, page 456. Computation of same.

3. When a mortgage is assumed as part of the consideration of a deed and no mortgage tax was paid thereon, a deed tax must be collected on the entire value of the property conveyed.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge receipt of your request for opinion of January 7, 1939, which is as follows:

"Will you please give us your opinion on the following questions:

"1. What kind of tax should be collected on the filing of a lease sale contract? That is, a contract for the sale of real estate whereby the lessor sells to the lessee certain real estate for a certain sum of money to be paid in installments over a period of years, and the lessor agrees to make the lessee a warranty deed conveying the property on payment of the final installment.

"2. What kind of tax, if any, should be collected on the filing of a filling station lease? That is, a lease or rental agreement whereby the owner of the property leases to another party a certain filling station site for a given period, usually from 1 to 5 years, for a given monthly rental payment, usually being based on the number of gallons of gasoline sold from the station during the preceding month.

"3. Your office has repeatedly held that the tax due on the filing of a deed for record is based on the value of the property conveyed. In case where a mortgage is assumed in a deed as a part of the consideration, your office has held that the amount of the existing mortgage may be deducted from the consideration of the deed and deed tax charged only on the balance, provided that the mortgage tax was paid on the mortgage when it was filed for record, and that no deduction can be allowed for any mortgage assumed on which the mortgage tax was not paid when it was filed. The question we wish to ask you is this: In case where a mortgage is assumed as part of the consideration of a deed and no mortgage tax was paid on the mortgage when it was filed (for instance mortgage to the Federal Land Bank) is there any authority for charging a mortgage tax on the amount of the mortgage assumed in addition to a deed tax on the value of the property conveyed on the filing of the deed? If so, where a piece of property changes hands several times and a mortgage is assumed in each deed on which no mortgage tax was paid when it was filed, should this tax be collected on each such deed?

"4. In cases where the Federal Land Bank sells property for a cash payment and takes a mortgage back for the balance of the purchase

price and the deed sets out the amount of the cash payment and also the amount of the deferred balance stating that said balance is secured by a purchase money mortgage, should any mortgage tax be charged on the amount of this deferred balance on the filing of the deed in addition to a deed tax on the value of the property conveyed?"

1. In answer to your first inquiry, I wish to inform you that this office has held that when such an instrument is offered for record, there is due to be paid a deed tax on the cash payment, and a mortgage tax on the remainder, as provided in Schedules 46 and 94, General Acts of Alabama, 1935. **Opinions of Attorney General, Office Edition 1-B,** page 169. This holding was based on the reasoning that the instrument conveys an interest in real property and contains a security for the debt, which places it within the purview of the above quoted Schedules.

2. This office has ruled that a filing tax should be collected on such a filling station lease, as Schedule 46 of Section 348, General Acts of Alabama, 1935, page 456, provides for filing tax on a deed, bill of sale, or other instrument "which conveys any real or personal property within this State, or which conveys interest in any such property." **Biennial Report of Attorney General,** 1932-1934, page 568. The manner of computing this filing tax is stated in said opinion as follows:

"In an opinion appearing in the Biennial Report of the Attorney General, 1926-1928, page 183, it was held that a long term lease conveyed an interest in real estate, and was subject to the filing tax dependent 'upon the cash value at the date of making such lease of the interest conveyed.'

"In an opinion appearing in Biennial Report 1928-1930, page 538, the method of determining such present cash value was discussed and the table set out in Reiter Connolly Mfg. Co. v. Hamlin as Admr., 144 Ala. 220, was suggested, as a practical method of arriving at a fair result.

"The statute makes the tax payable on the value of the property conveyed. The determination of the value is necessarily a judicial question to be determined by the Judge of Probate in a judicial capacity. In the absence of fraud or palpable mistake, I assume his finding of fact is conclusive.

"Applying the foregoing principles I suggest that you estimate or ascertain as best you can the total probable monthly rental and apply same method similar to the table suggested in the Hamlin case, to determine the present cash value of the interest conveyed, giving consideration to any special facts appearing in any particular case."

3. In answer to your third question, I wish to apprise you that this office has ruled that where a mortgage is assumed as part of the consideration of a deed and no mortgage tax was paid thereon, there is nothing to deduct, and a **deed tax** must be collected on the entire value of the land conveyed. **Biennial Report of Attorney General,** 1926-1928, page 410. Therefore, since the deed tax is charged on the **entire** value of the property conveyed, because there was no mortgage tax collected, it naturally follows that there is no authority for charging a mortgage tax on the amount of the

mortgage assumed in addition to a deed tax on the value of the property conveyed on the filing of the deed.

4. In answer to your fourth inquiry, I wish to refer you again to the principle and opinion set out above in answer to your third question, which covers this problem fully.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 4, 1939.

Hon. W. L. Pratt,
Judge of Probate,
Bibb County,
Centerville, Alabama.

Taxation—Redemption of real estate from tax sales—Time—

Application for redemption of lands sold at tax sale held on November 25, 1935, is timely if made on November 26, 1938.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request as follows:

"On November 25, 1935, lands of the estate of T. A. Walker was sold for taxes and at said Tax Sale, Lewis Williams became the purchaser. As I understand the law at that date, three years was allowed for redemption. On the morning of November 26, I received a Special Delivery Air Mail letter, postmarked at Charlotte, N. C. November 24th at 11 P. M. 1938. Please advise if the parties who hold a right to redeem were barred, for the reason that the actual money was not in my hands on the day of November 25th, or if they would be entitled to redeem, as the letter bearing the funds for redemption was mailed as above-stated."

In my opinion, the receipt by you on November 26, 1938, of the letter enclosing the necessary money to redeem the lands from the tax sale, was within the time provided by law; and that the redemptioner is entitled to prosecute the redemption to effect.

Section 268 of the Revenue Code of 1935 provides, in part:

"Real estate which hereafter may be sold for taxes * * * and purchased by any other purchaser (than the state) may be redeemed at any time within three years from the date of the sale by the owners* * *."

This provision of law is a substantial substitute for its predecessor appearing in Code of Alabama, 1923, Section 3109.

By Section 13 of the Code, it is provided:

"The time within which any act is provided by law to be done must be computed by excluding the first day and including the last * * *."

In **Rice v. Beavers & Company,** 196 Ala. 355, the Court in construing this statute, said:

"When a statute fixes a time within which an act may be done, the first day must be excluded and the last day included to compute it."

Applying that rule, it is clear that if the sale of the land for taxes was had on November 25, 1935, the deposit of the money for redemption on November 26, 1938 was "within three years" of the date of sale.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 7, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

License Refund—Section 366, Revenue Code of 1935, held not to apply in case where petition for refund shows affirmatively that amount requested as refund was never paid.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of January 17, 1939, in which you request my opinion as follows:

"We hand you herewith attached, a petition for refund of privilege license money alleged to have been paid in error to the Judge of Probate of Franklin County, Alabama.

"The affidavit form on the bottom of this petition is properly filled in and the signature of the Judge of Probate is in order and would appear to comply with the statutes governing refunds of this nature, but at one and the same time the typewritten explanation offered in the explanation column of the petition is contradictory and would indicate that the error was not made by the authorities in the issuance of said license.

"Will you please advise me in the premises and oblige."

In reply, I wish to advise that the license refunding provisions of law are found in Sections 366 and 367 of the Revenue Laws of 1935 (General Acts 1935, pages 563, 564). I wish to call your particular attention to the provision of the above-named Section 366 that "* * * any person who, through a mistake or error on the part of the Judge of Probate, has paid to the Judge of Probate money that was not due from him for such license, or by such mistake has paid to the Judge of Probate for such license an amount in excess of that required by law for the business to be carried on by such person under the license, such person shall be entitled to have refunded, less commission retained by Probate Judge, to him the amount in either event so erroneously collected by the Judge of Probate * * *".

In the affidavit attached, the Probate Judge certifies that "The above license was paid to me as above-stated." "As above-stated" is not contradictory to the explanation given in the statement of facts as follows: "This license was issued on October 31st and the place of business was closed the next day, and they never did pay for the license." It is evident that the Probate Judge means to say that he issued the license without pay; that the petitioner who now requests repayment asks that the State pay "refund" on a license for which he paid nothing. Upon what mistake of the Probate Judge does the petitioner ask the State to refund to petitioner an amount which petitioner never paid for a license? The mistake of the Probate Judge here referred to is not such as was contemplated by the above-quoted provision of law. Petitioner has paid nothing to the State, and it is certain that the State can refund nothing to him.

Premises considered, it is my opinion that the mistake made by the Probate Judge in the instant case is not such a mistake as it contemplated by the Revenue Law quoted above, and that the petitioner is mistaken in his idea that he should have a refund for an amount which he never paid for a license.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 7, 1939.

Hon. J. B. Kirby,
Sheriff, Hale County,
Greensboro, Alabama.

Fees—Sheriff not entitled to charge a fee of 25c in addition to regular fee of 50c for issuing firearms permit as prescribed by Act No. 82, General Acts of Alabama 1936, as amended by Act No. 190, General Acts of Alabama 1936-37, p. 223.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your letter of January 23, which is as follows:

"Will you please advise me if it is a legal charge for the Sheriff of a County to charge a 25c fee other than the regular fee of 50c in the issuing of pistol permits?"

It is my opinion that sheriffs are not entitled to charge a fee of 25c in addition to the regular fee of 50c in issuing firearm permits.

Section 7255 of the Code of Alabama, 1923 is as follows:

"7255. No fee charged unless expressly authorized. The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

"An officer, demanding fees for services rendered, must point to some clear and definite provision of the statute which authorizes the demand, and compensation cannot be allowed, unless it is covered by a strict construction of the language employed in the statute. Statutes giving costs and fees will not be extended beyond that letter." **Herrmann v. Mobile Co.,** 202 Ala. 274, 80 Sou. 112; **Troup v. Morgan Couny,** 109 Ala. 162, 19 Sou. 503.

Section 7 of Act No. 82, General Acts of Alabama 1936, as amended by Act No. 190, General Acts of Alabama 1936-37, page 223, prescribes that the fee for issuing such licenses shall be 50c, which fee shall be paid into the county treasury. There is no provision for the allowance of a fee of 25c and, therefore, it is my conclusion that same would not be a legal charge.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 7, 1939.

Mrs. Daisy Donovan,
Child Labor Inspector,
Department of Labor,
Montgomery, Alabama.

Child Labor—Employment of child under sixteen years of age in amateur contests involving stunts, singing and dancing, wherein cash prize is offered winner of final contest, not violative of Section 3500 (15) of Code of Alabama, 1923.

Opinion by Assistant Attorney General Loeb.

Dear Madam:

I have your letter of recent date requesting my opinion as follows:

"We have been asked by a moving picture theatre owner, who wishes to hold a series of amateur contests involving stunts, singing and dancing, for an opinion in regard to the interpretation of the theatre clause of

the State Child Labor Law. He wishes to have children under the age of 16 enter these contests. At the end of a certain number of contests he proposes to have a final contest in which the winners will participate and a **cash prize** is offered for the winner.

"Section 3500, paragraph 15, of the Alabama Child Labor Law is as follows:

" 'Nor shall any child under the age of 16 years be employed upon the stage of any theatre or concert hall, or in connection with any theatrical performance or other exhibition or show, except that children 14 years of age may be employed as ushers in theatres or concert halls in accordance with the provisions of Sections 3495, 3502 and 3505 of this chapter.'

"Will you kindly give us an opinion as to whether or not such a contest is a violation of the Child Labor Law?"

In my judgment, the answer to your inquiry is dependent upon the connotation of the term "employed" as used in Section 3500 (15) to which you refer.

The legislative intent in the enactment of Section 3500 (15) is obvious. It was to prevent a child under sixteen years of age from being **employed** in the prohibited establishments, exhibitions or shows, when, by the nature of the work or the place of employment, his health or moral welfare might be impaired.

After carefully considering all of the code sections on the subject of Child Labor and the purposes of the legislation it is my considered opinion that the term "employed" as used in the statute implies a contract of employment for compensation, and work for hire, pursuant to such contract, whether said contract be oral, written or implied. This is the sense in which such legislation is generally understood. **Taylor v. State,** 199 N. W. 22 (Neb.); **State v. Erle,** 232 N. W. 279. Also see annotation in 72 A. L. R. 141.

Adopting the foregoing definition for the term "employed," it is my opinion that it would not be a violation of Section 3500 (15) of the Alabama Child Labor Law for the theatre owner to hold the amateur contests described in your inquiry. This conclusion is strengthened by the fact that the contests are labeled, and are, in fact, "amateur" contests. The term "amateur" is defined by Webtser as being "non professional," the term "professional" being defined as "engaging for livelihood in an activity pursued, usually or often, for non commercial satisfactions by amateurs." It is clear that under the plan described in your inquiry, the children would operate under no contract and certainly could not be said to be engaging in such contests for livelihood, inasmuch as they would receive no emoluments unless they should emerge victorious in the contest. This cannot be said, in my opinion, to constitute an "employment" within the inhibition of Section 3500 (15).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 7, 1939.

Hon. J. H. Sims,
Judge of Probate,
Bullock County,
Union Springs, Alabama.

Counties—Contracts—

1. Bullock County held authorized to purchase, without advertising for bids, materials for road construction.

2. County held authorized to contribute materials in lieu of money for construction of State-aid trunk road.

3. Contract of county with private corporation for purchase of road building materials, which contract is dependent upon conditions precedent to give it life, held not illegal.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 31, 1939, in which you request my opinion as follows:

"On the 28th day of January, 1939, the Court of County Commissioners of Bullock County, Alabama, passed a resolution pertaining to a contract which is set out in full in said resolution, a copy of which is hereto attached. It is distinctly understood, however, that the contract set forth in the resolution shall not become effective until the same has been declared to be valid and lawful by the Attorney General of the State of Alabama.

"Please advise me as follows:

"1. Whether or not the Court of County Commissioners of Bullock County can enter into a private contract, without advertisement, for the purchase of approximately $62,000.00 worth of materials to be used in the construction of roads.

"2. Whether or not the Court of County Commissioners of Bullock County can lawfully enter into a road building project with the State of Alabama, the conditions of which provide that the County is to contribute towards the construction of said road purchased materials, rather than money, of the value of $2,000.00 per mile which materials are to be purchased from a private corporation, without advertisement, and which materials will cost an approximate sum of $62,000.00.

"Whether or not the Court of County Commissioners of Bullock County can lawfully enter into the contract set forth in the resolution

hereto attached prior to entering into a contract with the State of Alabama mentioned in and contemplated by said contract."

In reply to your first question I wish to advise that an opinion addressed to Hon. Lawrence K. Andrews, County Solicitor of Bullock County, reported in Quarterly Report of Attorney General, Volume VII, page 101, answers your first question in the affirmative. I wish to refer you to the following provision of this opinion:

"In my opinion, whether ratified by the Court of County Commissioners or not, the purported agreement as set out in the letters attached is a contract in violation of Section 1327(124), Michie's Code of 1928. The letter from the Chairman of the Court of County Commissioners to the Southeastern Construction Company dated March 12, 1936, is in form an offer to purchase all necessary materials for the construction of a bituminous paved highway from Union Springs to the Montgomery County line. **If this were the entire contract, in my opinion it would be valid."** (Emphasis supplied).

I wish to further refer you to the case of **Ensley Motor Co. v. O'Rear,** 71 So. 704, in which the court said:

"With the more recent demands for better roads and more secure bridges and ferries in all sections of the country — in the rural or country districts, and often at points remote from the county site or market places, as well as in urban localities — greater engineering skill and improved machinery and facilities are necessary, in the construction and maintenance of these public agencies. If a board of revenue or court of county commissioners may employ skilled architects to make plans for county ferries, bridges, and buildings, it may provide for like superintendence and inspection. So, also, if the necessary material, equipment, and labor, for the proper construction and maintenance of the public roads, bridges, and ferries may be purchased or engaged, and the services of a competent engineer or inspector are required to construct or supervise such public improvements, there can be no doubt of the right to contract therefor."

In reply to your question numbered 2, I wish to advise that in my opinion the answer to this question must take into consideration the provisions of Section 1397(25) of Michie's Code of 1928, which provides as follows:

"Application by counties for state aid. — Whenever a court of county commissioners, board of revenue of other like governing body of a county, shall desire that a state trunk road or bridge on a state trunk road in said county be constructed or maintained with state aid, written application shall be made by the county to the State Highway Department under such rules and regulations as the Department may prescribe. Such application, when made, shall be considered by the department and if approved by it, the commissioners shall direct an engineer to view said road or bridge and cause to be made surveys, plans, specifications, and estimates of the cost of construction or maintenance and the State Highway Department may thereupon appropriate out of the State Highway Fund such part of the estimated cost of such work as it may deem proper and the State Highway Department shall proceed to do such work by contract or with its own force. If it deems best,

the department may accept appropriations from the county for said work, which shall be paid into the state treasury to the credit of the State Highway Fund, before the work begins. Whenever a county fails to make application for the construction or maintenance of a road, or bridge or the department deems it best for such work to be done, it may proceed to construct or maintain any part of the state trunk road or bridge upon a state trunk road and pay part or all of the cost of such work out of the State Highway Fund."

I wish to further refer you to Section 1397(110), Code of 1928 (Michie's), which provides as follows:

"Powers of courts of county commissioners with regards to roads, bridges and ferries. — The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this State have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this article, courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

In my judgment, Section 1397(110), quoted supra, provides ample power, when considered in connection with the conclusion of the Supreme Court in the above-cited case of **Ensley Motor Company v. O'Rear,** to afford authority to the county governing body to purchase the materials named, as provided for by the attached contract, and to use the same in the construction of the highways named, if the county intended to construct the highway considered, independent of the State Highway Department. The only question then left for consideration is whether or not such materials can be appropriated to be used in connection with a cooperative program of the Highway Department for the construction of said road, which is a state trunk road. Section 1397(110), supra, is by its own provisions limited only by "local or special statutes" of the State, or the provisions of "this article," subject to the provision that the debt must be paid within ten years, and, of course, as limited by the Constitution.

The only question here presented, then, is whether or not under the provisions of Section 1397(25), supra, the county is prohibited from appropriating the materials for the construction of the highway, subject to the approval of the Highway Department instead of the cash money.

In this connection, I wish to call your attention to the provision of Section 1397(25), supra, as follows:

"If it deems best, the department may accept appropriations from the county for said work which shall be paid into the state treasury to the credit of the State Highway Fund, **before the work begins.**" (Emphasis supplied.)

In my judgment, this provision states no limitation which would prohibit the appropriation of the money or its equivalent value in materials for the construction of the highway in question, when such appropriation is acceptable to the State Highway Department. To hold otherwise would be to read into the statute a prohibition which does not, in my judgment, exist. Conceivably, a county may possess the exact materials necessary for the construction of such a road and conditions may exist under which nothing but the actual services of the construction of the highway are left to be purchased by the Highway Department. Under these circumstances it must necessarily require a very strained construction of legislative intent, to say that the lawmakers intended that the county could not contribute the very materials necessary to construct the highway, when such materials were wholly acceptable to the Highway Department.

It is my judgment that by the provision here considered, the Highway Department may require the deposit of the county's appropriation before they begin the work or it may refuse to accept any appropriation from the county for the construction of such highway if they see fit. In short, it is my opinion that the Highway Department is charged with the duty here of exercising a reasonable judgment as to the best interests of the Highway Department in the making of cooperative contracts with counties for the Construction of State trunk roads.

It is therefore my opinion that your second question should be answered in the affirmative.

In reply to your question numbered 3, it is my opinion that the contract set forth in the resolution hereto attached in so far as the court of county commissioners of Bullock County and the Tuskegee Asphalt Corporation are concerned, could be legally made, since the same is a contract contingent upon the action of the State of Alabama and the State Highway Department. The contract has no life until it is approved by the State Highway Department.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 11, 1939.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Judge of Probate —

Under local bill, Judge of Probate of Morgan County may close office at noon each Saturday until the following Monday morning.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 25, 1939, in which you request my opinion as follows:

"A local bill has been introduced into the legislature in words and figures as follows:

"'BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"'Section 1. From and after the passage of this Act it shall be lawful for the offices of the Judge of Probate, Tax Assessor, Clerk of Circuit Court, Tax Collector, Register of the Circuit Court, and Board of Revenue, or other like governing body of Morgan County, Alabama, to be closed from noon on each Saturday until the following Monday morning.

"'Section 2. That this Act shall be effective upon its approval by the Governor.'

"Section 9577 of the Code of 1923 reads as follows:

"'OFFICE AND OFFICE HOURS — He must keep his office at the courthouse and open for transaction of business on every day, except Sundays and legal holidays, from nine in the morning, until four in the afternoon.'

"Will you please give me your opinion as to whether or not the Probate Judge's office in Morgan County, Alabama, could close at noon on each Saturday until the following Monday morning, under the local act above referred to, without violating Section 9577 of the Code of 1923?"

Replying to your inquiry, I wish to advise that, in my opinion, under the Act quoted in your letter, it will be lawful for the Judge of Probate to close his office at noon on Saturday until the following Monday morning without violating Section 9577 of the Code of Alabama of 1923. Section 9577, as quoted in your inquiry, provides that it is the duty of the Judge of Probate to keep his office open for the transaction of business on every day, except Sunday and legal holidays, from nine in the morning until four in the afternoon.

The effect of the local bill which you quote is to change Section 9577 with respect to the Judge of Probate of Morgan County. I presume from your inquiry that you desire a determination of whether or not such an enactment would be unconstitutional as violative of Sections 104 or 105 of the Constitution of Alabama of 1901. In my opinion, the local act is obnoxious to neither Section 104 nor Section 105 of the Constitution. There is nothing in Section 104 which prescribes or prohibits the enactment of a local act relative to the time of opening or closing the office of the Judge of Probate or of any other county office.

Section 105 is as follows:

"No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law."

This section has often been considered by the Supreme Court of Alabama, and in **Standard Oil Co. v. Limestone County,** 221 Ala. 231, 124 So. 523, 526, the court speaking through Mr. Justice Bouldin, says of Section 105:

"Suffice to say it is fully settled that this section does not forbid local legislation on subjects not prohibited by section 104, merely because a general law deals with the same matter. If, in the judgment of the Legislature, local needs demand additional or supplemental laws substantially different from the general law, the Legislature has power to so enact. Courts are charged with the duty to determine whether there is a substantial difference between the general and the local law, but cannot invade the legislative domain to determine whether a county should have a local law substantially different and in addition to the state law.'

The foregoing conclusions are in accord also with those reached in the early case of **Brandon v. Askew,** 54 So. 605, 607, wherein Mr. Justice Sayre states, speaking of Section 105:

"Whatever of obscurity there may be in this provision of the Constitution, it is certain that it was not intended to prohibit all local legislation. It was not intended to prohibit local legislation on subjects according to any specific classification. That was done in section 104, where those classes of local laws which were to be prohibited are catalogued, and presumptively the framers of the Constitution said in that section all they intended to say on that subject. It was not intended to operate against local legislation in those cases where a local statute undertakes to do something that has been precisely done in a general law. It could not be assumed that the Legislature would waste its time in the duplication of statutes. But if the local bill proposes something different from the provisions of the general law, and not within the catalogue of section 104, and in a case where the relief may not be had in some proceeding outside of the Legislature, how has it been provided for, and where is the inhibition to enact the local law?

"It seems, then, that this provision of the Constitution was intended to prohibit the enactment of special, private, or local laws to meet the purposes of particular cases which may be accomplished by proceedings outside of the Legislature under the provisions of general statutes enacted to meet all cases of that general character. And it is made the duty of the Legislature to pass general laws under which local and private interests shall be provided for and protected. Const. Section 109. Such seems to have been the acceptance of this provision in City Council of Montgomery v. Reese, 149 Ala. 188, 43 So. 116."

In the light of the foregoing judicial decisions, therefore, it is my opinion that the bill referred to in your inquiry would not be violative of either Sections 104 or 105 of the Constitution of Alabama of 1901, and that, therefore, the Judge of Probate of Morgan County may under such bill, if legally enacted, close his office at noon on each Saturday until the following Monday morning.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 11, 1939.

Hon. C. C. Pritchett,
President, County Treasury,
Marengo County,
Thomaston, Alabama.

County Treasurers — Depositories in lieu of County Treasurers— Certificate required under Section 291 of Revenue Act of 1935 is applicable only to monies deposited by Tax Collector with County Treasurer or Depository in lieu of County Treasurer and not other collections made by Tax Collector and deposited elsewhere.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of January 13, 1939, in which you request my opinion as follows:

"The Planters Bank & Trust Company of Thomaston, Alabama, has been designated as the County Depository of Marengo County, Alabama, and has qualified and is acting as such, Marengo County having a depository in lieu of a county treasury.

"Hon. Sam Drinkard, Tax Collector of Marengo County, has presented to me a statement which is in the regular form used by all the Tax Collectors of the State of Alabama, containing reports of state taxes, county taxes, and county school taxes. He deposits his collections of state taxes with the Robertson Banking Company at Demopolis, Alabama, which is a State Depository. He deposits with the Planters Bank & Trust Company, the County Depository, the county taxes, and he pays over to the Custodian of School Funds the county school taxes.

"The regular form contains the following certificate which is to be signed by the County Treasurer or in this case the County Depository, the statement being as follows: 'I hereby certify that the above is a correct statement of collections made to me under oath by the Tax

Collector.' (It appears to me that this is not in accordance with the last paragraph of Section 3085 of the Code of Alabama of 1923.) You will observe that I handle only the county funds, and from the deposits made with me of these funds, I can certify that as far as the county funds are collected, it is correct. Without any reflection whatever on the Tax Collector, it is impossible for me to certify whether or not his statement as to the state taxes and county school taxes is correct as they do not come into the possession of the County Depository. While, for Mr. Drinkard's convenience, I signed this certificate on the 11th day of January, 1939, I am advising him that I can not certify as to the statements being correct on further reports. Permit me to suggest that, if the Tax Collector will deposit all of the funds with me as County Depository and then draw his checks in favor of the State Depository and the Custodian of the School Funds, then I will be in a position to sign the certificate required.

"I am advised that, as County Depository, you will give me an opinion on the foregoing. Will you be so kind as to advise me promptly, as the report has to be made every fifteen days."

In answer to your inquiry I am of the opinion that the certificate in question signed by the County Treasurer (or depository in lieu of County Treasurer), is only a certification as to the correctness of the statement of the collections made to the County Treasurer (or depository in lieu of County Treasurer) under oath by the Tax Collector. In other words, it is applicable only to the monies deposited with the County Treasurer (or depository in lieu of County Treasurer) by the Tax Collector and not other collections made by the Tax Collector and deposited elsewhere.

The certificate in question is made under the provisions of Section 291 of the Revenue Act of 1935, which brought forward Section 3038, Code of 1923, with some additions, into the Revenue Act of 1935.

The form of the certificate signed by the County Treasurer (or depository in lieu of County Treasurer) is as follows:

"I hereby certify that the above is a correct statement of collections made to me, under oath, by the Tax Collector."

It will be noted that the certificate is as to **collections made to me,** (me being the County Treasurer (or depository in lieu of County Treasurer)). The certificate is confined to such collections alone.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 11, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Taxation — Section 296, General Revenue Act, 1935, held not applicable to cases involving disputes concerning true taxable value of real property.

Opinion by Assistant Attorney General Small.

Dear Sir:

This is to acknowledge receipt of your letter of January 17, 1939, in which you request my opinion as follows:

"We hand you herewith attached a petition for refund which has been filed with this Office by J. W. Ditto, of Jackson County, Alabama. This petition offers no justification whatever except a matter of judgment on the part of the petitioner, and before we may write him on the subject we prefer a letter from you in which legality of the claim is discussed.

"Upon receipt of your letter we shall promptly notify the petition and if the claim is an invalid one, we shall quote from your letter accordingly."

In reply, I wish to advise that in my opinion you, as Comptroller, are not authorized to draw a warrant for a refund of the claim set out in the petition attached to your letter. Section 296 of the 1935 Revenue Act, under which this petition was filed, provides as follows:

"Any taxpayer who, through any mistake, or by reason of any double assessment, or by any error in the assessment or collection of taxes, or other error, has paid taxes that were not due upon the property of such taxpayer, shall, unless such tax was with knowledge of the facts voluntarily paid by the taxpayer, be entitled, upon making proof to the satisfaction of the state comptroller of such payment, to have such taxes refunded to him, if application shall be made therefor, as hereinafter provided, within two years from the date of such payment."

In my judgment, the provisions of law set out in this section do not apply to the instant case. Said section is intended to afford a remedy for the correction of clerical errors, or errors in the nature of clerical errors. It is not intended to cover matters of judgment concerning taxable value of property.

The instant case presents a situation wherein the taxpayer claims that his property was assessed at a much higher valuation than it should have been. The facts set out by the petitioner do not disclose errors of a nature which would bring this case within the purview of Section 296, General Revenue Act, supra. A remedy is provided by law for excessive assessments by the provisions of Article III, Section 67, et seq. of the Revenue Laws of 1935 (General Acts 1935, page 289), which provides as follows:

"Section 67. The members of the courts of county commissioners or Boards of Revenue, other than the judge of probate, of the several counties of the State, together with the tax assessor of such counties are hereby constituted a board of review, whose duty it shall be to inspect, review, revise, and fix the value of all the property returned to or listed with the tax assessor for taxation each year; in addition to duties as a member of the board of review, the tax assessors of the several counties shall act as secretary of such board, provided, however, nothing in this act shall be construed to require the tax assessor or boards of review to value any property required by law to be assessed for taxation by the State Tax Commission. The majority of the Board of Review shall constitute a quorum of such board for the performance of the duties required herein; provided that at any time the State Tax Commission shall deem it necessary, it may go or send or use agents or representatives into any county with authority to act in an advisory capacity and in conjunction with the Board of Review and perform such other duties, with respect to the valuation and assessment of property for taxation as may be required of them."

The levy and assessment was made in accordance with law through the act of the tax assessor in fixing the valuation here concerned. This has been held to be a legislative function, and the acts of the assessing official in making assessments and fixing the value of property are equivalent to the acts of a court of limited jurisdiction which constitutes a part of the machinery set up by the Legislature for this purpose. See **Penny v State,** 229 Ala. 36.

The premises considered, it is my opinion that petitioner in the instant case does not ask for the correct remedy and that the claim is invalid.

See also **Singer Sewing Machine Co. v. Teasley,** 73 So. 969.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 11, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Corporations — Penalties collected under Sections 7211 and 7212 of the Code of 1923 should be paid to the State Comptroller for certification to the State Treasurer.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of a letter of June 15, 1938, from your predecessor in office, which is as follows:

"A question has arisen as to whom the penalty on a foreign corporation as provided for in Section 7211 should be paid. The State Tax Commission contends the same should be paid direct to this office and should not be handled by the State Tax Commission.

"It is the contention of this Department that all moneys paid by foreign corporations except the money collected by the Secretary of State should first be paid to the State Tax Commission and entered on their records and they in turn notify this Department to certify same into the State Treasurer to the credit of the proper fund.

"I wish to call your attention to Acts amending Section 7214-15-16 of the 1923 Code. This amendment transfers the collection of the Entrance Fee due by foreign corporation from this Department to the State Tax Commission. Since Section 7211 deals with penalty for failure to pay the required Entrance Fee, it is our contention that the Tax Commission should handle all funds relative to collection of Entrance or Qualifying Fee.

"1. Should the collection of penalties under Section 7211 be paid direct to the Comptroller's Department by the corporation or should same be paid to the State Tax Commission?"

In answer to your inquiry I am of the opinion that the penalties collected under Section 7211 and Section 7212 should be paid to the State Comptroller for certification to the State Treasurer. The penalties collectible under Sections 7211 and 7212 are, in my opinion, penal in their nature and are tantamount to punitive damages assessable against a foreign corporation for failing to properly qualify and failing to designate a known place of business and an authorized agent. Said collections are not part of the taxation system and should not be handled through the Tax Commission.

Both Sections 7211 and 7212 provide for payment to the State, and Section 7213 provides specifically that said collections when made be paid into the State Treasury. This, in my opinion, means a direct payment to the State Treasurer, through the State Comptroller, as the certifying agency, in the same manner as in other instances when there is no specific mode of collection and transmittal provided.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 11, 1939.

Hon. Frank Julian,
Superintendent of Insurance,
Capitol.

Credit Unions — State not liable for expense of examination by a practicing public accountant unless examination made by order of the Superintendent of Insurance.

Opinion by Assistant Attorney General Mitchell.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"I am enclosing herewith copy of An Act entitled 'To provide for organization, operation, and supervision of Cooperative Savings and Credit Associations to be termed "Credit Unions" and to define their powers.'

"Your attention is directed to Section 6 of this Act, line 6, which reads as follows: 'Credit Unions shall be examined at least annually under the direction of the Superintendent of Insurance except that, if a credit union has assets of less than $25,000, he may accept the audit of a practicing public accountant in place of such examination.'

"You will note that said Act does not provide for compensation for those who are called upon by the Superintendent of Insurance to examine them. We therefore present the following question and ask your opinion of same. If the Superintendent of Insurance should order someone to examine the books of a Credit Union, shall the payment for the service of the accountant so examining be paid out of the State funds. If the Superintendent of Insurance accepts the audit of a practicing public accountant, in place of such examination, who shall pay said accountant for such services rendered?"

Replying to your first question:

"If the Superintendent of Insurance should order someone to examine the books of a Credit Union, shall the payment for the services of the accountant so examining be paid out of the State funds?"

I am of the opinion that where an examination made of the books and records of a credit union in accordance with an order of the Superintendent of Insurance and under his supervision and control as provided in Section 6 of the Credit Union Law, that the expenses incident to such an examination are "expenses of the Insurance Department." I refer you to Section 8370, Code of Alabama, 1923, which is as follows:

"The State Auditor shall pay, upon vouchers approved by the Governor, out of this insurance fund alone **the expenses of the insurance department.**" (Emphasis supplied).

In reply to your second question:

"If the Superintendent of Insurance accepts the audit of a practicing public accountant, in the place of such examination, who shall pay said accountant for such services rendered?"

I am of the opinion that State funds are not available for such expense.

Section 6 of the Act provides:

"Credit unions shall be examined at lease annually under the direction of the Superintendent of Insurance **except that,** if a credit union has assets of less than $25,000, **he may accept the audit of a practicing public** accountant in place of such examination." (Emphasis supplied).

The excepting clause in this section provides for an audit that is not done under the direction of the Superintendent of Insurance.

Section 11 provides in part as follows:

"The Supervisory Committee shall * * * (b) make an annual audit and report and submit the same at the annual meeting of the members * * * ".

In my opinion, the exception provided for in Section 6 was intended to permit the Superintendent of Insurance to accept, in lieu of his own examination, an audit made by a practicing public accountant under the direction of the Supervisory Committee complying with the provision of Section 11 above quoted, in which case the Credit Union would be liable for the expense of the examination.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 11, 1939.

Hon. G. W. Cuninghame,
Register, Marengo County,
Linden, Alabama.

Costs — Trial Tax.

Trial tax chargeable when case docketed even though file in case is lost.

Opinion by Assistant Attorney General Mitchell.

Dear Sir:

I have your letter of January 18, 1939, in which you request my opinion as follows:

"The former register of this county died, and I was appointed by the Judge as register, and I find that the records of the officer are in bad shape and there is a case on the trial docket entered by him with no reference to it elsewhere in the office to be found, and the auditors in checking me together with the former register were unable to find any file or other records in connection with the case, and the case has been

passed a number of times by the Judge, but the last time he made entry on trial docket as follows: Dismissed without prejudice, and what I want you to advise me about is whether or not in your opinion I could be held for the Trial Tax in the case. You understand that I have no record to go by, and for this reason it would be impossible for me to ascertain the amount of cost in the case necessary in issuing execution for cost as I have no idea what the cost is in the case. I do not see how I could be held responsible under the existing circumstances, but I want you to advise me what to do, if anything."

Replying thereto I am of the opinion that a trial tax must be charged along with such other costs as accrued from the mere docketing of the case. The fact that you are unable to determine what other fees, if any, were chargeable does not release you from liability for the trial tax and it should be assessed against the plaintiff as in all cases of dismissal of suit.

Section 9 of Act No. 194, approved July 10, 1935, (General Acts, 1935, page 263) is as follows:

"Section 9. A trial tax of three dollars ($3.00) be, and the same is hereby imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected to be paid by the clerk or register of such court as follows: One-half (½) thereof into the general fund of the State Treasury, and the other one-half (½) into the general funds of the county in which the same is collected and for collecting and remitting such tax, the clerk or register may retain five per cent (5%) commission thereof. In all counties in this State where the clerk or register is paid on a salary basis under constitutional authority, the five per cent (5%) commission provided for by this Act shall not be collected, but such clerk or register shall pay to the State and county respectively, each one-half of such trial tax. This trial tax fee shall not, however, be imposed or collected in cases made by any city, or town as a result of the filing by the clerk or other officer of such city or town with the Register of the Circuit Court or like officer of a court of the county having equity jurisdiction, of a list of delinquent taxpayers and property upon which city or town taxes are due as is now or may hereafter be required by law; nor shall said trial tax fee be imposed or collected in any ancillary proceedings, such as garnishment process, resulting from prior proceedings in which said trial tax fee has been imposed, and cases for municipal assessments shall not be subject to such tax, and tax cases."

I also wish to refer you to an opinion rendered by this office on January 31, 1935, to Hon. J. F. Smith, Clerk of the Circuit Court of Escambia County, a copy of which is herewith enclosed. This opinion is authority for the position here taken.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 11, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

County Officers — State Comptroller should assess penalty from $50.00 to $100.00 per month under Section 4 of Act No. 26, H. B. 49, approved February 8, 1935 (General Acts, 1935, p. 43) against the county officer and his official bond for the period of continued failure or refusal to comply with the Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request of January 26, 1939, for official opinion, which is as follows:

"Please refer to Act No. 26, General Acts 1935, page 43 and advise me as follows:

"1. If an officer has failed and/or refused to keep the records prepared and installed by the Comptroller in accordance with such Act, would it be the duty of an Examiner to charge such officer and his official bond with the penalty as set out in Section 4?

"2. If the Examiner should charge such penalty to the officer, should the amount be the maximum or minimum amount as set out in Section 4?"

In my opinion, if the county officer fails or refuses to comply with the provisions of the Act, then it is your duty as State Comptroller to charge such officer and his official bond with the penalty as prescribed by Section 4 of Act No. 26, which provides in part as follows:

"A continued failure and/or refusal on the part of such officer, to comply with the provisions of this Act shall subject such officer, as a liability on his official bond for neglect of duty, to a penalty of not less than $50.00 (fifty dollars) nor more than $100.00 (one hundred dollars) per month for the period of such failure."

The Act supra, gives you some latitude as to the amount of the penalty you should assess against the official and his bond, in that you can assess the county officer and his bond from $50.00 to $100.00 per month for the period of continued failure or refusal to comply with the Act.

The first part of Section 4 of the Act provides criminal liability for violating the Act and the latter part provides civil liability for violating the same. These liabilities are separate and distinct and independent of each other.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 15, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

State Comptroller — Audits — Books and records of a high school which pertain to funds for official uses should be examined under Section 736(1), Code of 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 7, 1939, in which you request my opinion as follows:

"Have the Examiners of Accounts the power, responsibility and duty of examining and auditing the books and records of the Murphy High School, Mobile, Alabama?"

I am of the opinion that your inquiry should be answered in the affirmative provided the books and records in question pertain to funds for official uses of the school.

Chapter 24 (Sections 735-752) provides for the Department of Examiners of Accounts. This department was transferred to the office of the State Comptroller as the "Division of Departmental and County Audits" under the Budget and Financial Control Act (General Acts 1932, p. 36).

Section 736(1) of the Code of 1923 provides as follows:

"736. Powers, duties and functions of department enumerated.— The department, acting under the direction of the governor and through the officials hereinafter provided, shall have and perform the following powers, duties and functions:

"1. To examine and audit the books, accounts, vouchers and records of every state or any other officer, public institution, organization or person receiving or disbursing any funds that belong to the state or to state institutions, or to any county in the state, or any funds that have been appropriated by the legislature for any persons, institutions or organizations, or any funds from any other sources coming into their hands as such officers for official uses."

The above section is broad and includes all funds held for official uses. The high school in question is a part of the educational system of Mobile County and most of its funds would be held for official uses. As to funds held for official uses, such accounts should be audited as provided above. However, said section would not apply to private funds not used in connection with the official functions of the school, such as private clubs, private enterprises, etc., although operating within the school.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 15, 1939.

Hon. G. C. Brittain, Secretary,
Board of Revenue,
Calhoun County,
Anniston, Alabama.

Where a claim or fee that is fixed by law is made certain, such claim does not have to be presented to the Board of Revenue to be audited, examined and allowed, and is not barred by the statute of limitations for one year.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

This is to acknowledge receipt of your letter of January 13, 1939, in which you request my opinion as follows:

"As county treasurer and secretary of the Board of Revenue, I submit the following to you for an opinion.

"Mr. P. W. Cotton, sheriff of Calhoun County, failed to receive from the circuit clerk certificate for his attendance on the circuit court during jury sessions for any of the time he has been sheriff.

"He has received certificate, copy of which I herewith enclose, on the 29th day of December, 1938 covering the amounts due him for the years 1937 and 1938. He has attached this certificate to a regular claim against Calhoun County and the same has been duly sworn to and was filed with the Board of Revenue on December 29th. The Board has allowed this claim but wishes to have your opinion as to the following:

"Can the Board of Revenue pay the claim for the items for services more than twelve months antedating the filing of this claim with the Board of Revenue, or would the statute requiring claims to be filed within twelve months bar all items more than twelve months preceding the filing of claim?

"Since the amount is fixed by law and the clerk failed to furnish the sheriff with the certificate but is now willing to furnish this certificate, and has furnished certificate for the years 1937 and 1938, the Board of Revenue is in doubt as to whether or not such claim or claims have to be filed with the board within twelve months.

"Your opinion on this would be appreciated as early as you can furnish the same. Also, the Board would like to know if claims are filed for services during the two preceding years during the time Mr. Cotton was sheriff, would the same be barred?"

It is my opinion that Mr. Cotton, former Sheriff of your county, is entitled to his pay. I am aware that the provisions of Section 228, Code of Alabama 1923, provide that claims must be presented to the county within

one year or they will be barred. However, in my opinion, this has reference to certain claims that have to be audited, examined and allowed and does not have application to fixed claims, that is, fixed by law, such as we have here.

Section 7287, Code of Alabama 1923, as amended by an Act approved May 27, 1931, General Acts 1931, page 261, specifically says "Attendance upon the probate court where a jury is in attendance, or upon the circuit court, when a jury is in attendance, each day to be paid out of the county treasury —$3.00." Our courts have held that where a provision is made that a fee or an allowance is paid out of the county treasury, this means the general fund.

I do not think this is a matter that has to be presented to your Board of Revenue and allowed, as it comes under the class of salaries, etc. **State v. Stone,** 229 Ala. 357; **Mobile County v. Barnes,** 225 Ala. 127; **Lovelady v. Loveman, Joseph & Loeb,** 191 Ala. 96; **Dallas County v. Gunter,** 46 Ala. 118. See also an opinion of this office written July 19, 1936 to Hon. Chas. W. Lee, State Comptroller, Quarterly Report of Attorney General, Vol. IV, page 25.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 15, 1939.

Hon. Frank M. Dixon,
Governor,
Capitol.

Whenever lands are bought in by the State for taxes and conveyed to the State Commission of Forestry under Sections 284 and 286 of the Revenue Act of 1935, the title to such land becomes absolute in the State Commission of Forestry, and when such lands are condemned by the Federal Government under its right of eminent domain, the price paid for such lands becomes the funds of the State Forestry Commission.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have a letter of November 29, 1938, addressed to this office by Hon. Bibb Graves, former Governor, requesting an opinion of this office relative to certain matters pertaining to the Alabama State Forestry Commission. I also have your letter of January 30, 1939, in which you express the desire that this opinion be answered. The original request is as follows:

"Please give me your opinion in reference to the following matter:

"The Alabama State Commission of Forestry, under the provisions of Sections 284, 285 and 286 of the Revenue Act of 1935, secured for the nominal cost of $1.00 certain land which was thereupon condemned by the United States Government in a condemnation proceeding. In this proceeding the Forestry Commission received for its interest in said land the sum of $539.68, which represented all taxes due on the property in question.

"This land is held by the Forestry Commission under an Act of the Legislature of 1935, page 1078, which provides:

" 'The Commission for the purpose of establishing, developing, and maintaining State forests and State parks, may acquire land by donation, purchase or condemnation, and for these purposes may use such funds as may be available to it and not otherwise obligated, and shall have sole charge of all State forests and State parks and shall have authority to make such rules and regulations for the administration, occupancy, and use of said State forests and State parks as it shall find necessary.'

"Please advise me whether or not the funds realized by the State Forestry Commission in the condemnation proceeding properly belong to the State Forestry Department, and if not then in what fund should they be placed."

Section 284 of the Revenue Acts of 1935 provides that "any lands which have been bid in by the State at a tax sale shall, after three years have elapsed from the date of sale to the State and no person having any interest therein having redeemed the same from tax sale, be subject to conveyance to the State Commission of Forestry in the manner hereinafter provided." This section provides the modus operandi of such a conveyance which must be followed strictly in all respects in carrying out this method of transfer. When this is done and the conveyance is made by the State to the Forestry Commission, the title of the State to such land passes absolutely and becomes the property of the State Commission of Forestry.

Section 286 of the Revenue Acts of 1935 further provides:

"When the lands are required to be conveyed to the State Commission of Forestry, as herein provided, the State Land Commission, in behalf of the State, with the approval of the Governor, shall execute to the State Commission of Forestry a deed, duly acknowledged, without warranty or covenant of any kind on the part of the State, expressed or implied, conveying to the State Commission of Forestry **all right, title and interest of the State in and to said lands so conveyed.**"

Then the section, supra, goes on to provide further.

"The State Commission of Forestry shall thereafter have all right, title and interest of the State in and to said lands, and shall be held and treated as the assignee of all the taxes due upon said lands, or for which they were sold and the penalties and all the taxes that should have been under the law assessed upon same, if they had been the property of a private citizen of this State, and it shall be clothed with all

the rights, liens, power and remedies whether as plaintiff or defendant, respecting said lands as an individual purchaser at the tax collector's sale would have in similar circumstances * * * ."

From the above-quoted sections there can be no doubt but that the State Forestry Commission has a right to and can absolutely control said lands within the bounds prescribed by law. When the State conveys the lands herein under consideration and the right to redeem by any person in interest is closed, the Forestry Commission has a right to use the lands in any way designated by law at its discretion.

Therefore, when the Federal Government exercises its right of eminent domain and condemns the lands for Federal purposes, the commission holding the legal title to same, it is my judgment that the money derived from the Government through condemnation proceedings would belong to the Commission of Forestry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 15, 1939.

Hon. J. C. Kellett,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

Charitable associations or societies charging a membership fee and regular monthly dues from members organized solely for the purpose of furnishing without profit caskets, embalming, and other necessary supplies or services for burial of members must comply with the requirements of the Superintendent of Insurance before obtaining license to do business, unless such association or society is a secret and benevolent society with **ritualistic** form of work.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of November 23, 1938, which is as follows:

"Mr. H. P. Emmett of Fort Payne, Alabama, has submitted to me the question of whether or not a group of interested parties may organize under Sections 7167-8, Code of Alabama, as amended by Acts 1927, pages 83, 84 and 85, under the following specified conditions:

"The group desire to organize a mutual burial service society, each member to pay $10.00 membership fee and dues of 10 cents per month,

the association to furnish the coffin, hearse, embalming, etc., at actual cost, the head of the family to pay the membership fee, and each member of the family eligible to service at cost. The association will either purchase caskets, rent hearses, pay an undertaker or embalmer, or enter into contract for such services. The membership fee and the monthly dues are to cover all expenses of administration. No profit is to be made by the association.

"Mr. Emmett desires to file the certificate provided for in the acts mentioned, three to twenty-four trustees to sign. The trustees will actively manage the affairs of the association. It is suggested to me that in Section 7167, as amended by Acts 1927, pages 83-4, it is provided that churches, religious societies, educational, benevolent, monument, burial and patriotic societies; societies for the purpose of nature study or scientific research, for establishing public parks or places of public recreation, for promoting knowledge, promoting arts, promoting sciences or **for purposes of like kind** or owners of a graveyard, or the trustees of the churches, conferences, etc., shall adopt a resolution signifying an intention to incorporate and elect trustees. It is further suggested that if the corporation outlined does not come within the limits of those described specifically in the act, then it certainly should come under the head of a society of like kind.

"I would be glad if you would advise me as to whether or not I should receive such certificate as outlined."

In answering your inquiry, I gather from your letter that the proposed society or association is not in the nature of a secret lodge, society or organization with **ritualistic** work.

I am therefore of the opinion that such burial society is not governed by Sections 7167-8 of the Code of Alabama as amended by the Acts of 1927, but must be governed by the General Acts of 1935, page 165, et seq., which in part is as follows:

"Section 1. All companies or associations, whether voluntary or incorporated under the laws of this or any other state, doing in this state a business limited to the issuing of certificates or policies to or agreeing with their members of policyholders upon the birth or death of any child, upon marriage, death, sickness, or upon any physical disability of such member or policyholder, to pay money or render aid including burial benefits or the furnishing of complete funerals to him or to others dependent upon him, or beneficiary designated by him, which money or aid is derived from donations, fees, dues, assessments or premiums, are hereby declared to be mutual aid, benefit or industrial companies or associations.

* * * *

"Section 3. Every such company or association shall, before transacting any business in this state. submit to the Superintendent of Insurance copy of its charter, by-laws, contracts or policies, schedule of rates and other instruments governing its operation, together with its financial statement. If upon examination thereof, the Superintendent of Insurance finds that the schedule of rates is adequate to cover the risk under its contracts or policies, and finds that the charter, by-laws,

contracts, certificates, policies and financial statement of such company or association meet all other requirements of this act and of any amendment subsequently made of it, he shall issue to such company or association a license to transact business as a mutual aid, benefit or industrial company or association. No such company or association shall be licensed, authorized or permitted to transact business in this State until the Superintendent of Insurance has approved its charter, by-laws, contracts, certificates, policies and financial set up and finds that they comply fully with all the requirements of this act."

"Section 14. Nothing herein contained is intended nor shall it be contrued to apply to any secret or benevolent society, such as Masons, Odd Fellows, Knights and Ladies of Honor, Knights of Pythias, or like orders, nor to any association organized under the lodge system for purely benevolent purposes with the ritualistic form of work, nor to any company, association or society organized and operating under the general insurance laws of this or any other state, and maintaining on deposit with the State Treasurer or other officer of the State in which it is incorporated, One Hundred Thousand ($100,000.00) Dollars in approved securities."

I also wish to call your attention to Section 18 of the above-named Acts of 1935, which provides as follows:

"Section 18. All existing laws relating to individuals, copartnerships, corporations or associations, whether voluntary or incorporated under the laws of this or any other State doing the business of a mutual aid, benefit or industrial company or association as hereinbefore defined, to the extent that the same are in conflict with the provisions hereof, are hereby repealed."

It is my opinion that until the proposed society has submitted its plan to the Superintendent of Insurance and has obtained from him a license to transact business, such society cannot qualify under the laws of this State.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 16, 1939.

Hon. William V. McDermott, Member,
Mobile County Revenue and Road Commissioners,
Mobile, Alabama.

Mobile County — Board of Revenue.

The Board of Revenue of Mobile County has the authority, under their general powers in fixing the salary and compensation of the jail physician, the poor asylum physician and the superintend-

ent of the poor asylum, to allow said officers a stated sum of money for traveling expenses or for necessary expenses incurred in carrying out their official duties.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letters of recent date wherein you request my opinion as follows:

"Under the authority of Section 2806 (32) and Section 2806 (33), Code of Alabama, Michie's, Mobile County employs a Superintendent of the poor asylum and a poor asylum physician.

"Under the authority of Section 4823 of the Code, Mobile County employs a jail physician.

"Under the Constitutional Amendment requiring the Board of Revenue of Mobile County to adopt a budget for its general fund operaations, we have set aside a sum of money to be paid as a salary to the officers named above and in addition a sum of money to pay for gasoline and oil to be used in the private automobiles of the above named officers in connection with their official duties.

"Recently the President of the Mobile County Board of Revenue and Road Commissioners has undertaken to stop the withdrawal and issuance of county gasoline to certain employees of Mobile County in their private automobiles. These parties include the jail physician, the poor asylum physician and the superintendent of the poor asylum. These employees as stated above, use their private automobile in connection with their official duties for Mobile County.

"I would like to know whether or not the Board of Revenue of Mobile County has the authority to supply gasoline and oil to be used in the private automobiles of the jail physician, the poor asylum physician and the superintendent of the poor asylum in carrying out their official duties for Mobile County."

In answer to your request, I note the jail physician, the poor asylum physician and the Superintendent of the Poor Asylum of Mobile County are employed under the general powers of the county governing body. Under these powers, the county governing body is given the authority to fix and determine the length of the employment and is also given the power to fix and determine the amount of compensation which shall be paid.

The Supreme Court of Alabama considered a situation somewhat similar to the one detailed by you. (See **Yielding v. Ball,** 205 Ala. 376). In that case, the sheriff, coroner, tax collector, humane officer and health officer of the county were using county automobiles for carrying out their official duties. There the action sought to enjoin the Board of Revenue of Jefferson County from paying claims for gasoline and oil and repairs. The court held that under the general authority of the county to fix the compensation of their employees.

"It expressly or impliedly authorizes them to provide transportation for the officers when in the discharge of their official duties.

Further, this office in an opinion found in Quarterly Reports of Attorney General, Vol. V, p. 58, held that a County Board of Education was authorized to furnish a supervisor or attendance officer with an automobile as a part of his salary contract. The reasoning there is applicable to the instant situation.

It is, therefore, my opinion that the Board of Revenue of Mobile County has the authority in fixing the compensation of the jail physician, poor asylum physician and the Superintendent of the poor asylum to include therein a specific sum of money to pay for the official travelying expenses of these officers.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 17, 1939.

Hon. C. E. McNatt, Clerk,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

Solicitors — Fees —

Solicitor's fee in Law and Equity Court of Franklin County on charge of practicing dentistry in violation of Section 3875 is $10.00.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your request for official opinion under date of February 10, 1939, as follows:

"A defendant was convicted in the Law & Equity Court of this County on a change of Practicing Dentistry without a license in violation of Section 3875, Code of Alabama, 1923. Please advise me what Solicitor's fee should be taxed against the Defendant? I wonder if the Solicitor's fee should be $30 or $10?"

In answer to your inquiry, I am of the opinion that the proper solicitor's fee to be charged is $10.00.

Section 3875 of the Code of 1923 provides as follows:

"Penalty for practicing dentistry without license. — Any person who engages in the practice of dentistry either as assistant or employe, or who receives any license required by law to practice dentistry, except he shall have passed the examination provided for by chapter 18, of this Code, and received the certificates as therein provided, and any person who practices dentistry in this state without having received a certificate as therein provided, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars, nor more than two hundred and fifty dollars, for the first offense, and for the second offense a fine not less than five hundred dollars, or imprisonment of from one to six months in jail, or both, in the discretion of the court."

It will not be noted that a prosecution under said section is not for practicing dentistry without a license but for practicing dentistry without having secured a proper certificate of qualification. A conviction under said section, in my judgment, would not be a conviction for violation of the revenue laws, which would require a $30.00 solicitor's fee under Section 3738, Code of 1923. It would require a $10.00 solicitor's fee under said section 3758, as the offense in question is for a conviction of a misdemeanor not otherwise provided for. Cf. **Quarterly Report of Attorney General,** Volume XI, page 24; **Biennial Report of Attorney General,** 1928-30, page 712.

I think it is proper to state that under Section 33 of the Act creating the Law and Equity Court of Franklin County, (Local Acts 1923, page 272), that the same solicitor's fees attach and are collected in said court as provided for in the circuit courts of Alabama.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 17, 1939.

Hon. Percy M. Pitts, Member,
House of Representatives,
Chilton County,
Clanton, Alabama.

Counties — Member of Legislature, who was employed as county attorney prior to March 2, 1937, cannot recover on such contract as same is void in violation of Section 5024, Code of 1923. However, county may pay reasonable amount for services rendered under Section 186 of the Code of 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of February 16, 1939, which is as follows:

"I was County Attorney for Chilton County for a number of years. the records of the Commissioners' Court of Chilton County show that for the months beginning September, 1933, and ending October, 1934, although I performed the duties as County Attorney, I did not receive any compensation as such County Attorney during those months, even though I performed all of the services required of me by law and was the only attorney used by the Commissioners' Court of Chilton County during that period.

"I was not paid because of the decision of the Supreme Court, which held that I could not be attorney for Chilton County while a member of the Legislature, which act has recently been amended so as to allow members of the Legislature to retain their connections with various county governing bodies.

"I respectfully request your opinion as to whether or not the Court of County Commissioners of Chilton County may legally reimburse me for my services, under the provisions of Section 186 of the Code of Alabama, 1923, if it is their desire to do so."

I am of the opinion that your inquiry should be answered in the affirmative.

The contract in question was void as being in violation of Section 5024, Code of 1923, and no recovery could be had thereunder. **Pitts v. Chilton County,** 27 Ala. App. 364, 173 So. 94. Cert. Den. 233 Ala. 579, 173 So. 95. Section 5024 was amended by Act No. 193, H. 300, approved March 2, 1937, (General Acts 1936-37, page 225) in regard to the employment by counties of attorneys who hold part time State or county offices.

However, in the instant case the contract was made in good faith and services performed accordingly. In my opinion, the county may pay a reasonable amount for said services under Section 186 of the Code of 1923. Said section provides in part as follows:

"186. Equitable claims or demands against county; mode of payment provided. — The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, To reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. * * * "

The county received the benefit of the services and may pay a reasonable charge therefor. — Opinion of Attorney General to Road Supervisor, Chilton County, on December 6, 1938; Quarterly Report of Attorney General, Vol. X, page 133. See also Quarterly Report of Attorney General, Vol. VIII, page 192.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 18, 1939.

Hon. J. W. Bryant,
Tax Collector,
Cullman, County,
Cullman, Alabama.

Taxation — Lien attaches on all property of taxpayer for taxes due on any of his property. Sale of real property, and payment of taxes thereon, does not relieve such property from being subject to levy for taxes on personal property due by taxpayer.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 26, 1939, in which you request my opinion as follows:

"Please give me an opinion relative to Sec. 177 on the following:

"Mr. A. assessed real estate and personal property together on the same assessment for 1938 taxes. He has sold the real estate to Mr. B. who has no interest in the personal property included in the assessment. Mr. A. has moved and with him he moved the personal property involved, and his whereabouts are unknown to us or his neighbors. Will I, as Tax Collector be required to make Mr. B. pay tax on the personal property here involved?""

In answer to your inquiry, I am of the opinion that B would not be liable personally for the tax on the personal property involved, but that the real property B purchased from A could be sold for the payment of the tax on said personal property.

Section 382 of the Revenue Act of 1935 provides as follows:

"From and after the first day of October of each year, when property becomes assessable the State shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him and upon each piece and parcel of property real or personal assessed to owner unknown which lien shall continue until such taxes are paid, and the county shall have a like lien thereon for the payment of the taxes which may be assessed by it; and if such property is within the limits of a municipal corporation such municipal corporation shall have a like lien thereon for the payment of the taxes which may be assessed by it. These liens shall be superior to all other liens and shall exist in the order named and each of such liens may be enforced and foreclosed by sale for taxes as provided in this Act, or as other liens upon property are enforced."

It will be seen from the above that a lien attaches on all of the property of a taxpayer for the taxes due on any of his property. The payment of taxes on separately assessed property does not relieve such property from

being subject to levy for any other taxes due by the taxpayer. **Biennial Report of Attorney General, 1934-36,** page 461. (See also Section 177 of the General Revenue Act of 1935.) Therefore, the real property of A would be subject to levy for the taxes due on his personal property. This is true although the real property has been sold to B. B acquired said real property subject to the lien for all taxes due by B on his assessment.

Section 169 of the Revenue Act does not have any application in the instant case. According to your statement of facts, A does not have any other property out of which the tax on the personal property involved can be realized. This is one of the conditions of the applicability of Section 169, supra. **Biennial Report of Attorney General, 1934-36,** page 564.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 21, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

State Highway Director — Act No. 13, General Acts 1939, approved February 3, 1939, authorizes Governor to fix salary of State Highway Director in an amount not to exceed $6,000 per annum, and makes an appropriation in the amount so fixed out of the general fund in the State Treasury.

Opinion by the Attorney General.

Dear Sir:

I have your letters of February 18, 1939, in which you request that I refer to Act No. 13, General Acts 1939, approved February 3, 1939, and particularly to Section 5 thereof, and advise you on the following questions in regard thereto:

The State Highway Director's salary having been fixed by the Governor, under the provisions of Act No. 13, supra, at $5,700 per annum, are you, as State Comptroller, legally authorized to honor monthly claims from the State Highway Director for his salary as so fixed; and if the money is appropriated for the payment thereof, is the same payable out of the general fund or the funds of the State Highway Department?

I am of the opinion that Act No. 13, General Acts 1939, approved February 3, 1939, and particularly Section 5 thereof, authorizes the Governor to fix the salary of the State Highway Director in an amount not to exceed $6,000 per annum, and that the Governor having exercised this authority and fixed the salary of the State Highway Director at $5,700 per annum, you are legally authorized to honor monthly claims for the payment of the same out of the general fund in the State Treasury.

Section 5 of said act reads as follows:

"The salary of the State Highway Director shall be fixed by the Governor at an amount not to exceed Six Thousand ($6,000) Dollars per annum, payable monthly out of the State Treasury as other salaries are not paid. The Highway Director shall also be paid his necessary travelling expenses when absent from the office of the said Department on business of the Department, upon itemized, verified statements approved by the Governor."

The language of the above-quoted section constitutes an appropriation sufficient to pay the salary of the State Highway Director in the amount of $5,700, as fixed by the Governor. This principle was enunciated in the decision of the Supreme Court of Alabama in the case of **State ex rel State Tax Commission vs. Smith,** 188 Ala. 432. In that case the salary of the State Tax Commission was provided for by Section 2218 of the Code of 1907, then in effect, in the following language:

"The Commission may appoint a Secretary at a salary of not more than $1,800 per annum, which salary shall be paid in the same manner as salaries of other state officials are paid."

The Court spoke as follows on the question of whether or not this was a sufficient appropriation of funds to pay the salary of the Secretary of the State Tax Commission, which had been fixed by the Commission at $1,800 per year, under the authority of said section:

"As to the salary of * * * the secretary, there existed no necessity for the Legislature to make an appropriation other than was made * * * in the section fixing the amount of the salary."

This decision was cited with approval by the specially constituted Supreme Court of Alabama in the case of **Abramson vs. Hard,** 229 Ala. 2, at page 10.

Cf. **Nichols vs. Comptroller,** 4 Stewart & Porter 154;

Reynolds vs. Taylor, 43 Ala. 418;

Riggs vs. Brewer, 64 Ala. 282;

State vs. Henderson, 199 Ala. 244;

In re: Opinions of the Justices, 234 Ala. 355.

Section 2713 of the Code of Alabama, 1923, provides in pertinent part as follows:

"Salaries of all officers are payable on the last day of each month * * * ."

The premises considered, I advise you that you are legally authorized to honor monthly claims for the salary of the State Highway Director in the amount of $5,700 per annum, as fixed by the Governor.

As to your question in regard to the fund or funds from which said salary is payable, I advise that the same is payable from the general fund of the State of Alabama. **State ex rel State Tax Commission vs. Smith,** supra. Cf. **Weaver vs. Tidwell,** 288 Ala. 169.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 25, 1939.

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Schools—Jefferson County Board of Education—

Jefferson County Board of Education is without legal authority to bond its bookkeeper and its Executive Assistant to the Superintendent of Education or to the Board of Education, unless the Court of county Commissioners, Board of Revenue or like governing body of the County considers such bonds necessary to protect the public interest, and requires the same; and, there is no legal authority for the Board of Education to pay the premium on such bonds.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of November 7, 1938, requesting my opinion as follows:

"Is it legal for the Jefferson County Board of Education to bond its Bookkeeper and its Executive Assistant to the Superintendent of the Board of Education? Is it legal for the Board of Education to pay the premiums on such bonds?"

In my opinion, both your questions should be answered in the negative.

A search of the records reveals no Local Acts of Jefferson County controlling this particular question. In my judgment, the Jefferson County Board of Education and the Superintendent of Education are governed by the general laws applicable. It must follow, therefore, that the question of official bonds is one to be governed by the provisions of general law.

Bonds for county officers or employees in county offices are provided for by the General Acts of 1933, Extra Session, at page 205, where Sections 18 and 20 of this Act provide as follows:

"Section 18. That when in the judgment of the Court of County Commissioners, Board of Revenue or like governing body of any county

it is considered necessary to the protection of the public interests, such governing body may require any county employee or any clerk, deputy or employee in any county office to give bond in such amount and with such surety as may be approved by said governing body, unless such bond is already provided for in this act."

"Section 20. The premiums on all bonds provided for in this Act, when made by surety companies, shall be paid by the respective counties out of the general funds of said county, except that the premiums on the bonds of Superintendent of Education and of County Treasurer of public school funds shall be paid by the Board of Education of said County out of the three mill tax and the premiums on all bonds of $1000.00 or less shall be paid by the officer making said bond."

The question then arises concerning whether or not the bookkeeper and executive assistant to the Superintendent of Education of Jefferson County are such officers or employees as come within the influence of an Act approved April 20, 1933 (General and Local Acts of 1933, page 205), which act is generally and will hereafter in this opinion be referred to as the Bains Act.

In the case of **State v. Tuscaloosa County,** 172 So. 892, 233 Ala. 611, the Supreme Court of Alabama, speaking through Justice Bouldin, clarifies this question with the following statement:

"The State, on appeal, insists that the county superintendent of education and county treasurer of school funds are 'county officers,' and because they are such the county is liable for the demands in question. They are styled 'county' officials in the laws creating same. The county superintendent of education, as the office existed in 1901, is listed among county officers removable by inpeachment under section 175 of the Constitution. See Petree et al. v. McMurray, 210 Ala. 639, 98 So. 782. Both are listed among 'county officials' under the statute relating to bonds of county officials, etc. General Acts, Extra Sess. 1933, p. 203, Sec. 2. That they are county officers in the sense that their official functions are confined to the territorial limits of the county is not questionable. But whether they are officers of the county, performing official functions for which counties exist, as local government entities, is another and different question. County Board of Education v. Slaughter, 230 Ala. 229, 160 So. 758."

Premises considered, it appears that authority for requiring bonds of clerks, deputies or employees in any county office is vested in the Court of County Commissioners, Boards of Revenue, or like governing boards of the several counties; and, if such bond is required, the premium on the same, if made by surety companies, should be paid out of the general funds of the county in which such clerk, deputy or employee is employed, if bond is in excess of $1000.00; otherwise, premium should be paid by the party making bond.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 25, 1939.

Hon. Frank M. Stewart,
Executive Secretary,
Alabama State Milk Control Board,
Montgomery, Alabama.

(1) Full amount of license fee, as provided for in Section 11 of the Milk Control Act (General Acts of 1935, Regular Session, page 210) should be collected by Milk Control Board for year 1939.

(2) There is no legal liability on the part of Milk Control Board arising from an accident involving one of its employee's automobile while such employee is acting within the line and scope of his duties; however, persons suffering injuries in such an accident is privileged to claim compensation therefor under provisions of Act creating State Board of Adjustment (General Acts 1935, Regular Session, page 1164).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of December 19, 1938, wherein you request the opinion as follows:

"As provided in the Milk Control Act, General Laws of Alabama, No. 163 (H. 311-Hamner), your official opinion is requested on the following questions:

"(1) What amount of license fees should the Milk Control Board collect for the year 1939 from those required to obtain licenses from the Board as provided in Section 11 of the Act? This is requested for the reason that the law expires June 31, 1939, as provided in Section 25 and it is our opinion that we cannot collect license fees for a longer period of time than the duration of the Act, which means we would collect one-half of the yearly fee.

"(2) Would there be any liability on the part of the Milk Control Board arising from an accident of an employee's automobile while acting within the line and scope of his duties, either to the employee or any other party or parties. If there is any liability on the part of the Board, how would the amount of the liability, and the manner of settling any claims be determined?"

In answering your first inquiry, I am of the opinion that Alabama Milk Control Board should collect license fees for the full year for 1939. Section 11 of the Act creating the State Milk Control Board (General Acts 1935, Regular Session, page 210) or so much thereof as is pertinent to the question, is as follows:

"Section 11. License Fees: All persons required by this Act to be licensed shall pay a yearly license fee * * *."

In Section 10 of the above-mentioned Act, provision is specifically made for the reduction in license fees in the case of the lapse of part of the license year prior to the time of making of application for license, the provision for this being in language as follows:

> "The license fees hereinafter fixed shall be reduced twenty-five per cent (25%) in the case of any license applied for, for each fully elapsed quarter of a calendar year prior to the issuance of such license under the provisions of this Act; provided, however, that no license fee for any period shall be less than twenty-five per cent (25%) of the total."

No provision is made for any reduction of license fees during the year 1939 by reason of the Act ceasing to be operative on the 30th day of June, 1939; and, considering the fact that the Legislature was specific in making provisions for reduction in license fees for time elapsed since the beginning of license year, and before application for licenses was made, it is only reasonable to presume that it would have made such provision for the last half of the year 1939 had there been an intention on its part to require only one half of the license fee for that year.

Answering your second inquiry as against the Board, there is no liability which could be enforced by suit in any Court in this State, incident to or arising from an automobile accident involving an automobile being operated by an employee of the Milk Control Board, while such employee is acting within the line and scope of the duties of his employment. The Milk Control Board being a State agency cannot be sued. **State Docks Commission v. Barnes,** 225 Ala. 403, 143 So. 581; **State Docks Commission v. Sossman,** 227 Ala. 700, 149 So. 923. However, any person damaged by any such accident may seek redress before the State Board of Adjustment under the provisions of the Act creating such Board, General Acts 1935, Regular Session, page 1164, as amended.

Of course, the employee causing the injury, as an individual, is personally liable for his torts.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 27, 1939.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

> Filing Tax—The yardstick for measuring the amount of filing tax to be charged for the recordation of deeds, is the actual fair market value of the property conveyed, which is not necessarily the consideration recited in the deed, nor the valuation of said property as fixed by the records of the Tax Assessor.

If the Judge of Probate, acting in good faith, is convinced that the consideration is the actual fair market value of the property conveyed, he will not be liable for the difference between said amount and the valuation as set by the records of the Tax Assessor.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge your letter of September 16, 1938, which is as follows:

"Schedule 26, Section 348, Alabama Revenue Laws, states that upon the presentation of a deed, or other instrument, for record, the Probate Judge shall determine the amount of tax due thereon; and upon the payment to him of the amount of such tax, and the recording fee, he shall accept the same for record.

"There are several opinions rendered from the Attorney General's office which state that the filing tax due on deeds is measured by the value of the property conveyed by the deed; which, I think is in harmony with the Act itself, wherein the tax is fifty cents for every $500.00 valuation, or fractional part thereof.

"I have had a great number of deeds filed for record during the past several months, in which the total consideration, or sale price, was contained therein.

"Upon receiving such deeds for record, where the total consideration is expressed therein, the persons filing such instruments are insisting that said consideration is the actual value of such property and are refusing to pay deed tax in an amount greater than said consideration. For example:

"'A buys a piece of real estate from B, paying $1,100.00 for four hundred acres, at the rate of $2.75 per acre. In writing the deed B conveys the said property to A and expresses this total consideration of $1,100.00 in the deed.

"'Upon the filing of such instrument for record, sworn testimony upon the part of reputable citizens prove that the consideration expressed is the total consideration.'

"However, upon examining the records of the Tax Assessor I find this said four hundred acre tract of land is assessed in the amount of $2,100.00, representing sixty per cent of the valuation as determined by the Board of Review; thereby causing the one hundred per cent valuation to amount to $3,500.00, which would necessitate the payment of $3.50 as deed tax on said instrument, instead of $1.50 deed tax upon the purchase price as expressed in the deed.

"I have been told by Assistant State Examiners that tax should be collected upon a one hundred per cent valuation, taken from the records

of the Tax Assessor, rather than upon the consideration, or total purchase price, paid for the property.

"There has been so much complaint on the part of attorneys and others filing deeds for record in this office that I am wondering just what yardstick may be used to measure and determine the value of property conveyed by deeds and the proper amount of tax to be charged thereon.

"If the Judge of Probate accepts the consideration named in the instrument as the total purchase price, or the fair market value of the property, is he liable for the difference between the market price and the full valuation figured from the Tax Assessor's records?"

It is my opinion that the true yardstick to be used in determining the amount of filing tax to be charged for the recordation of deeds, is the actual fair market value of the property conveyed by the deed, which is not necessarily the consideration recited in the deed, nor the valuation of said property as fixed by the records of the Tax Assessor.

This office has held that the filing tax is based upon the real value of the property at the date of the execution of the deed. The recited consideration is only prima facie evidence of the true value. The person offering such deed for record should furnish the Judge of Probate with full and satisfactory evidence showing the actual fair market value of the property conveyed, whether such value be more or less than the recited consideration. After the Judge of Probate has made investigation satisfactory to him, he should collect on the fair market value, as such property is usually sold. **Biennial Report of Attorney General,** 1928-1930, p. 210; **Biennial Report of Attorney General,** 1932-1934; **Quarterly Report of Attorney General,** Vol. I, p. 66.

In applying the above rule, we can readily see that, by the same token, the valuation as determined by the Board of Review is not always the fair market value of the property at the date of the conveyance. The market value of property varies according to circumstances. Therefore, it is my conclusion that it is not incumbent upon the Judge of Probate to accept the records of the Tax Assessor as the real value of the property in question.

Under the facts stated, if you are convinced that the recited consideration is the actual fair market value of the property conveyed, it is my opinion that the filing tax should be based upon same.

The Supreme Court of Alabama in the case of **Long, Judge vs. Jasper Land Co.,** 217 Ala. 593, 117 So. 210, stated "the determination of the amount of tax to be paid on an instrument is left to the probate judge. In accord with the rule that fraud and misrepresentation are not to be presumed, we are of the opinion that the probate judge may accept as prima facie correct the recitals of the deed—and may act accordingly, in the absence of any fact or circumstance to the contrary, coming to his attention calculated to put on notice a reasonably prudent person. Should it develop subsequent to the recordation of the deed that the recitals of the deed were misleading and untrue, **the judge of probate, acting in good faith as above indicated, would find protection,** though, under the language of the act, there may be a collection of the correct amount of tax due subsequent to the recordation

of the deed." (Italics supplied.) This case is followed by **Thompson, Probate Judge v. Smith,** 27 Ala. App. 460, 174 So. 796.

Therefore, it is my conclusion that if the Judge of Probate, acting in good faith, accepts the consideration named in the instrument as the total purchase price, i. e., if he is convinced that said amount is the actual fair market value of the property at the date of the conveyance, he will not be liable for the difference between the market value and the valuation computed by the Tax Assessor's records.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 27, 1939.

Hon. Frank Pearce,
Tax Assessor,
Marion County,
Hamilton, Alabama.

Claims against the County which are required to be passed by the Commissioners' Court or other like governing body must be presented for allowance and payment within twelve months or same are barred by the statute of limitations as set out in Section 228, Code of 1923. However, if Court of County Commissioners feel the claim is just and equitable, it may reimburse Tax Assessor to the extent of a reasonable sum for services rendered under Section 186, Code of 1923.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion under date of February 6, 1939, which is as follows:

"Here is the situation that I am in. In making up the Plat Book for the city property of this county I have failed for the past following years to file my claim before the Commissioners Court for the compensation I was to receive viz: 1936-1937 and 1938. I realize that I can't file a claim for this work I have done in the ordinary way and I would like for you to advise me in what way to file my claim in order to get pay for the work.

"I have made the book up each year in order but I failed to file claim each year due to the fact that I overlooked the Section of the Revenue Laws (Section 59) where it stated I was to be allowed a reasonable compensation for making the book.

"It seems that in a case of this kind there would be some protection in the matter as I have done the work and feel that I should be paid and the law in some way should set out some way that it could be collected as it would be hard for a man to do this work and fail to get pay for it."

It is the general financial policy of this State that all claims against a County shall be presented to the Commissioners' Court, or to the Board of Revenue exercising the powers and duties of the Commissioners' Court. **Miller v. Paris,** 145 Ala. 494, 39 So. 658.

There are two exceptions to this general rule. That is, where special laws in express terms or by necessary implication provide for a different mode of dealing with such claims or where the law itself determines the fact and the amount of the claim, leaving nothing to be ascertained or determined by the County Board. **State ex rel. City of Mobile v. Board of Revenue & Road Commissioners of Mobile County,** 180 Ala. 514.

It is further provided by Section 228, Code of Alabama, 1923, that all claims against a county must be presented for allowance within twelve months after they accrue, or become payable, or the same are barred. Section 228, Code of Alabama, 1923, is as follows:

"228. Claims barred if not presented.—All claims against counties must be presented for allowance within twelve months after they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

It has been held that Code Section 228, supra, applies to all claims against a county except those claims falling within the exceptions to the general rule heretofore pointed out. **State ex rel. City of Mobile v. Board of Revenue & Road Commissioners of Mobile County,** supra.

Your claim or claims for services rendered, as referred to in your letter, are not such as come within the exceptions, heretofore pointed out, and therefore must be filed with the Board of Revenue or like governing body of the county and must be filed within the time prescribed in Section 228, Code of Alabama, 1923, supra.

The law provides no other method of filing a claim than that heretofore set out and, therefore, it follows that if more than twelve months have elapsed since your claim or claims have accrued, or become payable, and you have failed to file your claim or claims, then the same are barred.

However, if the Court of County Commissioners feel that your claim for services rendered is just and equitable, I am of the opinion that said Court of County Commissioners may reimburse you to the extent of a reasonable sum for said services rendered under Section 186 of the Code of Alabama, 1923. Said section provides in part as follows:

"186. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall

determine from time to time for the following purposes : First, To reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. * * *"

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 27, 1939.

Hon. George Pegram,
Attorney for Board of Revenue,
Marengo County,
Linden, Alabama.

Counties—Claims against county which are not presented to the Board of Revenue or Court of County Commission for allowance, are barred by the statute of limitations after twelve months.

Except for rent accrued within twelve months, all claims against county for rent of a filling station are barred if not presented to the Board of Revenue within twelve months after they accrue or become payable. However, where county rented filling station and had benefit of the same, Board of Revenue may reimburse claimant for use of same under Section 186, of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated January 27, 1939, which is as follows:

"The Board of Revenue of Marengo County requested me to write you for advice on the following proposition:

"In 1937, the Board of Revenue of this county, by appropriate resolution, authorized the Member from the Southeastern District of the County to rent a storage tank for gasoline used by machinery for road work in his District. The Commissioner rented a vacant filling station, agreeing to pay $5.00 per month therefor, which was reported to the Board and was perfectly satisfactory, and the County has been using this filling station for gasoline storage purposes ever since, thus rendering rent due for about two years.

"Two claimants for the rent developed, and the Board advised the claimants that it was willing to pay whichever was really entitled to

it, but it would not pay one and run the risk of litigation from the other. The claimants have now reached an agreement of settlement, and the Board is willing, ready and able to pay it, but one of the Members suggested that all the rent except that which has accrued within the past twelve months is barred under the provisions of Section 228 of the Code of Alabama of 1923. In other words, that failure to file claims each month, barred all except rent accrued within twelve months.

"In view of the fact that it was a continuing rental agreement at a fixed sum, about which there can be no controversy, it is my opinion, based on the opinion of Mr. Somerville, Justice, in re State ex rel v. Board of Revenue etc., 61 Southern Reporter, page 816, second paragraph, and authorities there cited, that the claim can and should be paid, but of course my opinion does not protect the Board of Revenue, while yours will."

This office has held repeatedly that under Section 228 of the Code of Alabama, 1923, all claims against the county must be presented for allowance within twelve months after the time they accrue or become payable or the same are barred, except claims of minors and persons of unsound mind, who have twelve months from the removal of their disability to present their claims. This section is as follows:

"All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

The case of **State v. Board of Revenue & Road Commissioners of Mobile County, et als,** 61 So. 815, to which you refer as authority for paying this claim, deals with the exception to this Statute and is not applicable to your proposition. The statute expressly states that all claims agains a county must be presented for allowance to the Board of Revenue within twelve months after they accrue, or become payable, or the same are barred. The case of **State v. Board of Revenue & Road Commissioners, et als,** supra, deals with the two exceptions to this statute.

The two exceptions are, first, "Where special laws in express terms or by necessary implication provide for a different mode of dealing with such claims, that mode is, of course, to be followed, though in derogation of the general statutes and policy of the state." **Dale County v. Gunter,** 46 Ala. 134; second, "Where the law itself determines the fact that the amount of the claim, leaving nothing to be ascertained or determined by the County board, it is generally held that presentment for audit, and allowance or rejection, is not required." **Caldwell v. Dunklin,** 65 Ala. 461; **Shinbone v. Randolph County,** 56 Ala. 183.

The proposition presented by you does not fall under either exception to the statute.

It is true, as stated in your letter, that the amount of monthly rental has been agreed upon, but this is merely an agreement or understanding between the board of revenue and the claimant. It is not such a claim where the law determines the fact and the amount of the claim, and, there-

fore, it does not come within the exception to Section 228 of the Code of Alabama, 1923, as land down in **State ex rel. City of Mobile.**

It was further held in **State ex rel. City of Mobile v. Board of Revenue & Road Commissioners of Mobile County, et als.,** supra, as follows:

> "In cases other than these which fall within the two exceptional classes above referred to, we find no authority in our statutes or decisions for suspending the operation of our general statutes on this subject."

As I understand your letter, no claim was filed for this rent, and as such a claim would fall under the category of a common claim, it would be barred except for rent accrued within twelve months.

However, due to the fact that the county had the use and benefit of the filling station, I am of the opinion that the Board of Revenue may reimburse claimant for the use of the same under Section 186 of the Code of Alabama, 1923. Said section provides in part as follows:

> "186. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, To reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. * * "

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 27, 1939.

Hon. L. C. Garrison,
Judge of Probate,
Walker County,
Jasper, Alabama.

Filing Tax—Deed from the United States of America to the Bankhead Homestead Company, Inc. is subject to filing tax under Schedule 46 of Section 348, General Acts of Alabama, 1935.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your request for official opinion of January 27, 1939, which is as follows:

"In the operations of the Bankhead Homesteads Company, Incorporated, which has charge of large acreage near Jasper and upon which the government erected one hundred houses under the Resettlement Administration, they have filed a deed from the United States of America to Bankhead Homestead Company, Inc. The people filing the deed have the opinion that it does not bear the State deed filing tax. Your opinion by an early mail is earnestly requested. A copy of the deed, mortgage, mortgage note and an agreement are sent you herewith. Also a copy of letter received from Mr. Lewis B. Woodson, Regional Attorney, United States Department of Agriculture, Montgomery, Alabama."

It is my conclusion that the deed from the United States of America to the Bankhead Homestead Company, Inc. is subject to a filing tax based on the entire value of the property conveyed under Schedule 46 of Section 348, General Acts of Alabama, 1935.

Under the facts as presented, the United States of America, pursuant to proper authority, executed a deed to certain property situated in Walker County, Alabama, to the Bankhead Homestead Company, Inc. To secure the full purchase price thereof, the Bankhead Homestead Company, Inc. executed a mortgage to the United States of America.

Schedule 46 of Section 348, General Acts of Alabama, 1935, is in part as follows:

"No deed * * * which conveys any real or personal property within this State * * * shall be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record, to-wit: Upon all such instruments which are executed to convey real or personal property situated in this State of the value of Five Hundred Dollars ($500.00) or less there shall be paid the sum of Fifty Cents ($0.50), and upon all such instruments executed to convey real or personal property situated in this State of more than Five Hundred Dollars ($500.00) in value there shall be paid the sum of Fifty Cents ($0.50) for each Five Hundred Dollars ($500.00) or fraction thereof in value of property conveyed by such instrument. Provided that only the value in excess of any mortgages * * * upon any property within this State on which the mortgage tax **has been paid** shall be taxable under this schedule * * *." (Emphasis supplied)

It has been held by this office that no privilege tax is required to be collected for recording a deed wherein the United States of America is the grantee. **Quarterly Reports of the Attorney General,** Vol. I, page 95. Under this principle, it naturally follows that no mortgage tax can be collected on the mortgage from the Bankhead Homestead Company, Inc. to the United States of America when said instrument is offered for record.

This office has ruled, in construing Schedule 46, supra, that where a mortgage was given to the Federal Land Bank, no mortgage tax was paid on filing the instrument for record, and when a deed to the same property from the Federal Land Bank was offered for record by the grantee therein there was nothing to deduct; and, a deed tax must be collected on the entire value of the property conveyed. **Biennial Report of Attorney General,** 1926-28, p. 410; **Opinion to Hon. Homer F. Mitchell, Judge of Probate, Cullman County,** February 4, 1939, Office Edition, Book 2-B. When the deed from the United

States of America to the Bankhead Homestead Company, Inc. is filed for record, no mortgage tax having been paid on the mortgage from the Bankhead Homestead Company, Inc. to the United States of America, there is no question of "in excess of any mortgage" to be considered. Therefore, the deed tax should be measured by the entire value of the property conveyed.

It is a general rule of law that a corporation chartered by the Federal Government, or subsidized by it, is not exempt from state taxation unless it is employed as an agency or instrumentality for the exercise of the constitutional powers of the United States. The question then arises whether the Bankhead Homestead Company, Inc. is a governmental agency, and not subject to taxation. It is my opinion that the Bankhead Homestead Company, Inc. is not an instrumentality of the Federal Government, and its property is subject to be taxed. Said Company was duly incorporated under Section 7046, Code of Alabama, 1923, for the purpose of "rehabilitating and rendering self-supporting the families of its members (rural families of low income) by assisting or participating in the establishment, development and maintenance of farms, home and other facilities, including necessary or appropriate cooperative and community facilities and enterprises."

The Supreme Court of Alabama in the case of **Fairhope Single Tax Corporation v. Melville,** 193 Ala. 289, 69 So. 466, states as follows:

> "Obviously, the enactment of 1903, and its counterpart in the Code of 1907" (Section 7046, Code of Alabama, 1923) "* * * does not affect a change in any degree of tax systems or tax provisions * * *. The taxable property of an incorporation created by that authority, and all property taxable as that of individuals, who are members or lessees of the corporation, are subject to the same system of taxation, as far as the government is concerned, that any other property is subject to in this State."

Therefore, it is my conclusion that a filing tax should be collected on the deed in question, to be computed as set out above.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 27, 1939.

Hon. J. F. Davis, President,
Court of County Commissioners,
Covington County,
Andalusia, Alabama.

Counties—Highways—A county may pay the light and water bills of State Convict Camps and also rent on lands used by said camps, when prisoners are used in maintaining and constructing State highways (1) in said county, and (2) in said county, and other counties.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your request for official opinion dated February 13, 1939, which is as follows:

> "The State Highway Department has expressed a desire to locate a convict camp at Opp, in this County. The prisoners are to be used on the State highways in Covington, and probably in adjoining counties.
>
> "Does the Court of County Commissioners of Covington County have lawful authority to pay the light and water bills used in maintaining this camp, and also to pay the rent on land used for the location of said camp in this County, under conditions as follows (a) if the prisoners are used in **maintaining** the state highways in Covington and adjoining counties; (b) in **maintaining** State highways only in Covington County; (c) in **maintaining** and **constructing** state highways in Covington and adjoining counties; (d) in **maintaining** and **constructing** state highways only in Covington County?"

I am of the opinion that each of your inquiries should be answered in the affirmative.

Section 1347 of the Code of 1923, which is carried forward as Section 157 of the Highway Code of 1927 (General Acts 1927, page 348), and appears as Section 1397 (110) of Michie's Code of 1928, provides as follows:

> "Powers of courts of county commissioners with regards to roads, bridges and ferries.—The courts of county commissioners, boards of revenues, or other like governing bodies of the several counties of this State have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this article, courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

Under this section the county governing bodies are given legislative, judicial and executive powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties. See **Town of Eutaw v. Coleman,** 189 Ala. 164, 66 So. 464; **Ensley Motor Car Co. v. O'Rear,** 196 Ala. 481, 71 So. 704. They may enter into such contracts as may be deemed necessary or advisable in regard to the construction and maintenance of roads in their respective counties, subject to the limitation of the last clause of said section.

In my opinion, the county, if its governing body claims it advisable, may pay the light and water bills and also rent the lands used for the convict camps in question where the prisoners are used in maintaining and constructing roads in the county. Such could be part of the maintenance and construction of the roads, bridges and ferries, or incidental to such work. **Biennial Report of Attorney General, 1932-34,** page 396. The above is true although the roads in question are State highways. They are nevertheless public roads in the county.

It will be noted that the statute above-quoted includes construction, improvement and maintenance. From the above, it follows that your inquiries (b) and (d) should be answered in the affirmative.

In regard to your inquiries (a) and (c), the principles above set out are applicable. Although the prisoners are used in maintaining and constructing roads in other counties than Covington, they are also used in maintaining and constructing roads within Covington County. The fact that they are used in maintaining and constructing roads in Covington County brings the matter within the above-quoted section. The use of said prisoners in other counties would not, in my opinion, vitiate the power of the county governing body relative to their authority as to the roads in its own county. However, this factor may be considered in arriving at the actual benefit to Covington County by the use of the prisoners in maintaining and constructing the roads in that county. Such addresses itself to the sound discretion of the county governing body.

The premises considered, it follows that your inquiries (a) and (c) should also be answered in the affirmative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 28, 1939.

Hon. W. G. Hardwick, Member,
House of Representatives,
Capitol.

1. Statute authorizing an information in criminal case where constitution requires indictment by grand jury held void (Constitution, Section 8).

2. Constitutional provision for indictment cannot be waived by one accused of crime.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 23, 1939, in which you request my opinion as follows:

"In accordance with our conversation today, I would like to request that you prepare a bill making it possible for a defendant charged with a felony under a warrant, before he has been indicted, to plead guilty on an information drawn by the Solicitor. In my judgment, the Bill should provide that a plea of guilty could not be entered in such cases until thirty days after his arrest and until the Court had appointed him an attorney, or he was duly represented by an Attorney.

"The Judiciary Committee raised a point that in all probability it would be necessary to pass a constitutional amendment before this law could be passed, and I would appreciate it if you would write an opinion in order that I may submit it to the Judiciary Committee on this proposition. If, in your judgment, it is necessary to have a Constitutional Amendment on this proposition, I would appreciate it if you would have one prepared in order that I may introduce it in the House.

"I would like to point out that several other states have this law, and I know that Florida has a law similar to the one I have mentioned above. It seems to me that a defendant who is charged with a crime should not await in jail several months before being indicted when he desires to plead guilty immediately and begin his sentence. I might point out that capital cases should be excluded from this law."

In my opinion, an act permitting a defendant charged with a felony under a warrant, before he has been indicted, to plead guilty on the information drawn by the solicitor, thus waiving indictment by a grand jury, would be unconstitutional as violative of Section 8 of the Constitution of Alabama of 1901. This section provides:

"8. That no person shall, for any indictable offense, be proceeded against criminally, by information, except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or, by leave of the court, for misfeasance, misdemeanor, extortion, and oppression in office, otherwise than is provided in the Constitution; provided, that in cases of misdemeanor, the legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established."

Chief Justice Brickel speaking to this section in the case of **William v. State,** 61 Ala. 33, 38, has said that "this is unquestionably a constitutional guaranty against prosecution otherwise than on presentment of a grand jury."

In a case decided in November, 1928, (**People v. Christian,** 249 N. Y. 314) the Court of Appeals of the State of New York, dealing particularly with an act similar to that concerning which you inquire, held that the constitutional provision for indictment could not be waived by one accused of crime. The statute under consideration by the New York Court of Appeals was Section 222 of the Code of Criminal Procedure, as amended by Chapter 597 of the Laws of New York of 1927. This section, as amended, is as follows:

"Section 222. **Crimes; how prosecuted.** All crimes prosecuted in a Supreme Court, or in a county court, or in a city court must be prosecuted by indictment. But, where a defendant has been held to answer to any of these courts, that court, or any of said courts to which he

might have been held to answer, may, on the application in writing of the defendant, direct any information to be filed against him for the offense for which he stands charged."

The following quotation from the decision of the New York Court of Appeals in **People v. Christian**, 249 N. Y. 314, 164 N. E. 111, 61 A. L. R. 793, is submitted as authority for the conclusion hereinabove reached:

"The Constitution of this state, by article 1, section 6, provides: 'No person shall be held to answer for a capital or otherwise infamous crime * * * unless on presentment or indictment of a grand jury.' Relator was charged with burglary, which is an infamous crime. He was held to answer for it, but not on any presentment or indictment of a grand jury. While awaiting action by that body, he petitioned the court for a direction that an information be filed against him, and his petition was granted. Then he pleaded guilty, and was sentenced to confinement in the reformatory at Elmira. This procedure conforms with the provisions of Section 222 of the Code of Criminal Procedure.

"The Constitution and the statute meet in direct collision. The statute assumes to authorize the thing which the Constitution expressly forbids. The organic law decrees that no one shall be held to answer for an infamous crime until after a grand jury shall have considered the evidence against him. The legislative enactment says that an individual may, if he pleases, strip himself of a protection common to all within the jurisdiction of our government. This right, attempted to be conferred by statute, was not granted solely for the benefit of the criminal. Probably it was thought to be in the interest of the state. Doubtless the purpose of its attempted creation was to shorten procedure by inducing a criminal to forego a fundamental right, and, by swift admission of guilt, incidentally to mitigate his penalty but essentially to hasten justice. In practice, such a course is convenient. We are not dealing with policy, expediency, or convenience as viewed by the Legislature, but with public fundamental rights fixed by the Constitution. Whether the grand jury system erects a bulwark of liberty or operates as an engine of oppression is not for us to decide. In ancient times it may have formed a shield against the tyranny of the crown. Today it may serve as a check upon popular passion. Always it has been susceptible of utilization to pervert justice. Section 222 of our Code seeks to and does weaken the force of our Constitution, and, for that reason, it is void. The statute therefore adds nothing and takes away nothing. If, without its existence, the criminal possessed the right to fling away any part of the protection which the Constitution imposes upon all, neither he nor the state is strengthened or weakened by its passage. So the only question in this case is whether irrespective of the statute the basic prohibition of article 1, section 6, is capable of waiver. *** From this mass of opinions and decisions, the rule can be deduced that waiver is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result. A privilege, merely personal, may be waived; a public fundamental right, the exercise of which is requisite to jurisdiction to try, condemn, and punish, is binding upon the individual, and cannot be disregarded by him. The public policy of the state as expressed in the Constitution takes precedence over his personal wish or convenience. Article 1, section 6 proceeds far beyond the point of conferring a mere personal privilege. Unqualifiedly, it prohibits the trial of any one charged with infamous crime except on presentment or indictment by a grand jury. Until the grand jury shall act, no court can acquire jurisdiction to try. In the

most solemn and absolute language, the Constitution dictates the only method by which one can be held to answer for murder, burglary, arson, or any other infamous crime. Without the prescribed action by a grand jury, all our other tribunals are powerless to proceed. Such action is the foundation of jurisdiction."

The foregoing conclusion is in line with the statement of our Court of Appeals, which court in the case of **Kyser v. State**, 22 Ala. App. 431, 117 So. 157, certiorari denied 217 Ala. 561, 117 So. 159, speaking through Presiding Judge Bricken has said:

"Irregularities in obtaining jurisdiction of the person may be waived, but a formal accusation by indictment, or authorized information, or complaint supported by oath, is essential to complete jurisdiction, and cannot be waived."

Further answering your inquiry, however, you are advised that while a statute authorizing an information to take the place of an indictment in a felony case would be unconstitutional, there is no inhibition in the Federal Constitution against a constitutional amendment directed to this purpose. **Hurtado v. California,** 110 U. S. 516, 28 L. Ed. 232.

In **People v. Christian,** 249 N. Y. 314, 164 N. E. 111, supra, the court speaking to this question says:

"If the Legislature and the electors of this state vote to delete the words of article 1, section 6, from the Constitution, the historic if not venerable institution of the grand jury may be abolished. Not by indirection can it be subverted or overthrown. Citizens of other states have decided by their Constitutions to allow the prosecution of infamous crime without intervention by grand juries, and their action has been held not to impede due process of law. Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Bolln v. Nebraska, 176 U. S. 83, 89, 44 L. ed. 382, 384, 20 Sup. Ct. Rep. 287."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 28, 1939.

Hon. Chris J. Sherlock,
Commissioner, Highway Department,
Montgomery, Alabama.

Municipalities—Highways—

A municipality, which has obligated itself to pay a part of the paving of a highway through said municipality on a Federal aid project, may assess such proportionate costs against the property

benefitted thereby, provided such costs shall not exceed the increased value of such property by reason of the special benefit derived from such improvements; and provided further that the proper procedure in regard to making the assessments has been followed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of a letter of September 22, 1938, from your predecessor in office, which is as follows:

"On the Federal aid project now being constructed through the Town of Goodwater, the town has obligated itself to pay for a part of the paving. To raise the funds the Town of Goodwater has assessed abutting property owners. All except two of the said abutting property owners are agreeable to this assessment; however, two of the property owners claim that they cannot be legally assessed unless the city is an active party to the contract.

"Please advise this Department whether in such an agreement as outlined above a municipality has a right to assess abutting property owners for participation on the construction of a State Highway, which is a Federal aid project, when the municipality has executed an agreement with this Department for participation in the cost of the project."

In answer to your inquiry, I am of the opinion that a municipality, which has obligated itself to pay a part of the paving of a highway through said municipality on a Federal aid project, may assess such proportionate costs against the property benefitted thereby, provided such costs shall not exceed the increased value of such property by reason of the special benefits derived from such improvements; and provided further, that the proper procedure in regard to making the assessments has been followed.

The specific authority for a municipality to contract with the United States, the State or a county to share the costs of road construction within said municipality and to assess abutting property owners for the proportionate part thereof, is found in Sections 2252, 2253, 2254, and 2255 of the Code of Alabama, 1923.

Section 2252 provides as follows:

"Contracts between municipality and county, state, etc., for improvements.—Whenever the United States, the State of Alabama or any county within the State of Alabama, or either of them, shall establish, construct or reconstruct, improve or reimprove a public highway, street or avenue, which said street, highway or avenue is within or partly within any city or town of the State of Alabama, such city or town may contract and agree with either the United States government, the State of Alabama, or any county thereof, as to what proportionate share of the cost of the establishment, construction, reconstruction, improvement or reimprovement of such street, highway or avenue within such city or town shall be paid by such municipality, and such cities or towns may assess such proportionate cost of the establishment, construction, re-

construction, improvement or reimprovement of such streets, avenues, or highways against the property benefited thereby; but such cost shall not exceed the increased value of such property by reason of the special benefits derived from such improvements."

Section 2253 provides for the issuance of bonds. Section 2254 provides for liens on the property assessed. Section 2255 provides as follows:

"Proceedings; how conducted.—The proceeding under this article shall be held and governed by the general laws of the State of Alabama relating to assessments against property for public improvements insofar as said laws are applicable, except that sections 2182 (1367) and 2183 (1368) shall not apply in proceedings under this article."

It would seem from the preceding quoted section that the general laws relating to assessments against property for public improvements are applicable except that Sections 2182 and 2183, Code of 1923, do not apply. For your information, I wish to state that the general laws relative to municipal public improvements are now governed by Act No. 639, Senate Bill No. 432, approved September 10, 1937 (General Acts 1937, page 754), known as the "Municipal Public Improvement Act." Said act amends certain sections of Article XXXIII, Chapter 43 (Sections 2174-2237) of the Code of 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 28, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

1. Costs—The term "each year" as used in Act No. 145, Section 4, approved February 27, 1937, (General & Local Acts 1936-37, page 65) means the calendar year.

2. Solicitor's Fees—Solicitor's fees paid into the County Treasury are a part of the fees and costs referred to in Section 4, Act No. 145, (General and Local Acts 1936-37, page 65).

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion under date of January 26, 1939, as follows:

"Please refer to Local Act No. 145, Local Acts 1936-37 page 65, Sections 3669 and 3738, Code of Alabama, 1923, and advise me as follows:

"1. Would the year referred to in Section 4 be from January 1, to January 1, the calendar year; from February 27, to February 27, the calendar year from approval of such Act, or from October 1, to October 1, the fiscal year of the County?

"2. Would Solicitor's fees paid in the County Treasury be a part of the fees and costs referred to in Section 4?"

Upon considering the Act as a whole, it is my opinion that the term "each year" as used in Act No. 145, Section 4, approved February 27, 1937 (General and Local Acts 1936-37, page 65) means calendar year.

I answer your second inquiry in the affirmative. Section 4 of said Act provides in part that the fees accruing to sheriffs, constables, witnesses and justices of the peace when collected, shall be paid direct to those entitled to receive the same and it is further provided as follows:

"* * * and all other fees and costs, except those the clerk is entitled to retain as his compensation, and all fines and forfeitures collected for the County shall be paid by the said clerk to the County Treasurer monthly."

That this part of Section 4 of said Act where it refers to "all other fees and costs," includes the solicitor's fees which are to be paid into the County Treasury under authority of Section 7 of said Act seems a certainty. It is provided in Section 7 of said Act that "all County Solicitors' fees when collected, shall be paid into the County Treasury as **other costs.**"

It is my opinion that the solicitor's fees referred to in Section 7 are not to be construed as being separate and distinct from the fees referred to in Section 4 of said Act, but that it was purposely set forth in Section 7 of said Act that the solicitor's fees should be paid into the County Treasury as other costs and would be a part of the costs referred to in Section 4 of said Act so that it would be clear that the solicitor of said court would not be entitled to collect said fees.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 28, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

The county is without authority of law to pay for repairs on typewriter of deputy or circuit solicitors.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 17, 1939, in which you request my opinion as follows:

"I am requesting that you furnish me an opinion on the following legal question:

"1. Is the Commissioners Court of Elmore County authorized to pay a reasonable claim for repairs made on the typewriter of the Deputy Solicitor of Elmore County?

"2. Is the Commissioners Court of Elmore County authorized to pay a reasonable claim for repairs made on the typewriter of the Solicitor of the 19th Judicial Circuit of Alabama, Elmore County being one of the counties composing the 19th Judicial Circuit and the Solicitor residing in Elmore County and maintaining his office at the County seat of Elmore County?"

This office has held that a county cannot pay for stationery for the county or deputy solicitor. **Biennial Report of the Attorney General, 1926-28,** page 695, **Quarterly Report of the Attorney General,** Vol. VI, page 108. If the county cannot purchase stationery for the county solicitor, it cannot purchase a typewriter. If it cannot purchase a typewriter it cannot pay for repairs on same.

What I have said above as to deputy solicitors applies with equal force to circuit solicitors.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 28, 1939.

Hon. G. H. Howard,
Probate Judge,
Elmore County,
Wetumpka, Alabama.

A party who operates an electrical repair shop, and who repairs a radio that later is sold by the shop or the proprietor of the shop for repair work done on same, is not engaged in the business of selling radios. (Schedule 117, Revenue Laws, 1935)

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your request for official opinion under date of February 9, 1939, which is as follows:

"Please advise me on the following:

"We have a party in this county that has an electrical repair shop for repairing Radios, Refrigerators and Water Heaters. Occasionally, but not very often, he repairs radios on which he is unable to collect the charges for these repairs and it becomes necessary that he sell the radio in order to collect for his parts and labor. He does not buy radios for resale and does not sell any except as stated above to collect for parts and labor. He has bought the proper license to cover this repair shop. Is he liable for Radio Dealer License?"

It is my opinion the party you describe above is not within the contemplation of Schedule 117, Acts, 1935, page 488. You will note the Schedule says: "Every person engaged in the business of selling." The party you refer to, as I gather from your request, is not engaged in the business of selling radios, but operates an electric repair shop, and only sells such radios as are repaired by him to collect his repair bill on the failure of the party having radios repaired to pay such bill.

The fact that the operator of a repair shop sells a radio for charges against it for repairs is simply incidental to the furtherance of his business and does not in my opinion make him a seller, for in selling such radios, he is in fact enforcing a mechanic's lien.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 28, 1939.

Hon. N. F. Greenhill, President,
State Teachers College,
Livingston, Alabama.

Municipal Corporations—Town of Livingston cannot compel State Normal School to abandon its present sewerage disposal system and connect with newly constructed city sewerage disposal system.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 2, 1939, in which you request my opinion as follows:

"Some years ago the authorities of this institution built a sewer line to the Sucarnoochee River to which the principal buildings on the main campus were connected and have been connected since that time. Recently the town of Livingston secured a loan from the Public Works Administration for the installation of a sanitary system to serve the entire town. In our Southern Home (a newspaper published in Livingston, Alabama) under date of February 2, 1939, there appeared the following notice:

"The Town Council has been required by the government to pass an ordinance requiring every person to be connected with the sewer system within ninety days from date.

"Every person is required to secure a permit from the Town before connecting to the main line.

"We request that you make arrangements immediately to connect to the system.

Mayor and Town Council.

"I have discussed this matter with the Mayor of Livingston who seems to think that this ordinance requires us to connect to the new sewer. I cannot see the justice in that position since it would force us to abandon a sewer equally as good as that to which we would connect. Furthermore, our sewer was built at the expense of the institution many years ago when it was not possible to make any other provision to take care of the situation. There is practically no maintenance cost on our sewer whereas it would cost us more than $600.00 annually if we are required to connect to the new system.

"For your information I am enclosing copy of the ordinance referred to above with the request that you give me an official ruling regarding its application to this institution. To put the matter somewhat differently—Can the town of Livingston legally compel us to abandon our sewer and connect to the new sewer which has recently been constructed?"

I am of the opinion that your inquiry should be answered in the negative.

The general rule relative to the matter of your inquiry is set out in 43 Corpus Juris 247. Section 247 provides in part as follows:

"The State and Other State Agencies. Property of the state is exempt from municipal regulation in the absence of waiver on the part of the state of its right to regulate its own property; and such waiver will not be presumed. The municipality cannot regulate or control any property which the state has authorized another body or power to control. Thus it is held under some statutes that, where the legislature has placed the control of the public schools in boards of education, the municipality has no power to regulate the construction of public school buildings, but under other statutes creating school districts, a school district or board desiring to erect a school building within the municipal territory must comply with the municipal requirements."

The line of cases which hold that property of the State or its agencies is not subject to municipal regulation, proceeds on the following principle, as set out in the case of **Kentucky Institute for Education of Blind v. City of Louisville,** 123 Ky. 767, 97 S. W. 402.:

"That the state, when creating municipal governments, does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control. The municipal government is but an agent of the state, not an independent body. It governs in the limited manner and territory that is expressly or by necessary implication granted to it by the state."

There is nothing contained in our statutes which would give a municipality the right to regulate the property of the Normal Schools of this State. On the contrary, the Normal Schools are under the direct control and management of the State Board of Education.—Section 474 of the School Code of 1927.

In the instant case the Normal School at Livingston has its own sewerage disposal system. Consequently, the nuisance element from a health standpoint would have no application.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 28, 1939.

Hon. J. S. Burch,
Sheriff, Russell County,
Phenix City, Alabama.

Gambling devices—Pinball machine which is operated or can be operated as a game of chance, even though it does not pay off money, chips or other things of value held illegal. (General Acts of Alabama, 1931, page 806.)

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 15, 1939, in which you request my opinion as follows:

"Please advise me upon the following state of facts:

"Is a pin ball machine which does not pay off money, chips, or other things of value illegal as per the act approved July 25, 1931, General Acts of Alabama, page 806?

"This character machine is taxed by the State of Alabama, and is being operated here."

In my opinion, if the pinball machine described in your inquiry is operated or can be operated as a game of chance, then said machine is outlawed by the statutes of this State.

The General Acts of 1931, page 806, in defining the class outlawed by Subdivision (d) of Section 1 of said Act provides:

"Any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, which is operated or **can be operated as a game of chance.**" (Emphasis supplied)

The Supreme Court of Alabama, in considering a question similar to that concerning which you inquire, in the case of **One Penny Marble Machine v. State,** 233 Ala. 678, 173 So. 91, has held that the foregoing provision of the 1931 Act which outlaws a machine "which can be operated as a game of chance" is efficacious for that purpose, even though it does not appear that the machine was being so operated at the time it was seized.

In view of this opinion of the Supreme Court, I am constrained to hold that the pinball machine described in your inquiry comes within the condemnation of General Acts of Alabama, 1931, page 806, even though it does not pay off money, chips or other things of value.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 28, 1939.

Hon. G. H. Howard,
Probate Judge,
Elmore County,
Wetumpka, Alabama.

In order for a person to be exempt from paying a license from peddling dairy, poultry or farm produce, such produce must be raised, produced or grown by him or someone of his immediate household.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your request for official opinion of February 10, 1939, as follows:

"We have a party in this county that operates a Grist Mill and for his services he gets a small per cent of the meal ground for his services. We are allowed to give permits to farmers so that they may peddle produce grown by them without buying license. Can this meal that he gets for his services be classed as produced by himself? Is this party liable for a Peddlers License?"

I gather from your request that the party operates a grist mill and that he charges a toll for grinding meal for his customers. He desires to peddle the meal taken by him as toll and you ask whether or not be comes under the following exemptions as provided by Schedule 146, Revenue Act, 1935, (General Acts, 1935, p. 499, as amended). This exemption is as follows:

"This schedule shall not apply to a person, or to any member of his immediate household selling or offering to sell dairy, poultry, or farm products raised, produced or grown by himself or the immediate members of his household * * *."

The above quoted exemption in my opinion does not authorize one to peddle meal secured in such a manner without procuring a peddler's license.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 2, 1939.

Hon. G. W. L. Smith,
Attorney for Escambia County,
Brewton, Alabama.

Counties—Contract of employment with Deputy Solicitor of County for legal services is void and no recovery can be had thereunder. Due, however, to the urgency of the matter coupled with fact that County Attorney was ill, county may reimburse Deputy Solicitor by paying him a reasonable fee under Section 186, Code of 1923, provided it was not a duty that the solicitor was required to perform by law.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated February 16, 1939, which is as follows:

"1st. I am Attorney for Escambia County and its Governing Body. Recently while I was ill the County had an urgent matter to be attended to, and employed my friend and Attorney Hon. A. H. Elliott, who is Deputy Solicitor for Escambia County, Ala., to represent the County and look after the matter, which he did and he has presented a claim for his services; I want him to have his money and the County and the Court wants him to have his money.

"2nd. However, I am authorized and requested by the Court of Commissioners of this County to get a ruling from you on the matter.

"3rd. Please therefore write me a letter addressed **to me and** the Court of County Commissioners of Escambia County, Ala., advising and giving your opinion whether or not the Court of County Commissioners of said County is authorized to allow and pay the claim of Hon. A. H. Elliott, the County Deputy Solicitor of this County for his professional services rendered as Attorney representing Escambia County.

"(a) It may be that you have made rulings on the subject, or it may be that your predecessors in office have made rulings on the subject; I do not know of any Statute which prohibits the County from

paying the Deputy Solicitor for his services as Attorney for the County, but there may be some rulings in your office on the proposition.

"Is this matter covered by General Act No. 457, approved September 31, 1935, pages 988-989, General Acts of 1935;

"Does General Act 193, page 225, General Acts of 1937, govern the matter; this Act appears to have been intended to overrule Attorney General Knight's opinion on page 307, Attorney General's Reports of October 1, 1932-Sept. 30, 1934."

In answer to your inquiry, I am of the opinion that the contract of employment in question is void and no recovery can be had thereunder.

Section 5024, Code of Alabama, 1923, as amended by Acts of 1936-37, page 225, is as follows:

"That Section 5024 of the Code of 1923 be amended so as to read as follows: '5024. COUNTY OFFICERS INTERESTED IN COUNTY CONTRACTS, OR HIRE OF COUNTY CONVICTS.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the County for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers; but this section shall not be construed to prevent the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County from employing as attorney to such governing body an attorney who holds an office which does not preclude him from practicing law and does not require his full time and for which, as such officer, he is compensated on a per diem or fee basis, nor shall it be construed to prevent the Treasurer in lieu of a County depository from being employed as clerk to the Court of County Commissioners, Board of Revenue, County Commissioner or other governing body of the County.

"Approved March 2, 1937."

It will be seen from the above that said section prohibits the solicitor from accepting employment for work or services for the County. (See opinion of Attorney General to Judge of Probate, Tuscaloosa County, December 29, 1937.) The exemption provided in the last part of said section regarding the employment of an attorney to the County governing body applies only to an attorney who holds an office and as such officer he is compensated on a per diem or fee basis. (See opinion of Attorney General to the Judge of Probate, Bullock County, January 18, 1938.) The deputy solicitor of Escambia County is paid on a salary basis under provisions of Local Acts, 1927, page 41.

From the above it can be seen that the deputy solicitor of Escambia County cannot make a contract with the county and, therefore, the contract of employment entered into by and between the deputy solicitor of Escambia County and the governing body of said county is, in my judgment, void, and no recovery can be had thereon.

However, due to the urgency of the matter which confronted the governing body of the county, coupled with the fact that the attorney for the county was ill and unable to render the required legal services, I am of the opinion that the Deputy Solicitor may be reimbursed by the county to the extent of a reasonable fee for the services he performed under authority of Section 186 of the Code of Alabama, 1923, provided it was not a duty that the solicitor was required to perform by law. Said section is as follows:

"186. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, to reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, To refund to any person, firm or corporation, money, or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvement, tick eradication, or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the county was without authority to pay such claims on account of a defect in any law or any other reason."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 2, 1939.

Hon. Elmer L. Vinson,
Tax Collector,
Limestone County,
Athens, Alabama.

Land acquired under a rent-sale instrument is assessed for taxation in the name of the vendee and sale for payment of such assessment cannot be declared null and void by vendor.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your request for official opinion under date of February 8, 1939, which request is as follows:

"On November 20, 1933, Lot No. 7, Block No. 5 of Walker & Smith subdivision of Bell-Mina, Alabama, in this county was sold for 1932 state

and county taxes in the name of James Carter, the person to whom it was assessed. Mr. R. H. Walker says that this property did not belong to James Carter but was held by him on a Rent and Sale Contract, and that the property actually belonged to Walker & Smith. Now he wants the Probate Judge to certify that the sale was erroneous for the reason that James Carter never owned the above described land which was and is the property of Walker & Smith, Athens, Alabama.

"He also wants the Probate Judge to sign a certificate to the State Land Commissioner asking him to authorize the cancellation of this sale on the records of the Probate Court. Of course, I am not concerned with the Probate Judge's part of this certificate, but down below the Probate Judge's signature he has the following certificate:

"'I, Elmer Vinson, Tax Collector of Limestone County, Alabama, having examined the tax records in my office and in the office of the Judge of Probate of Limestone County, Alabama, hereby certify that the statements made in the above certificate of A. M. McConnell, Judge of Probate, are true and correct and the sale of said land to the State of Alabama, above described, should be cancelled as erroneous.'

"I did not sign this certificate because I do not know whether James Carter owned this property or not, and it is my opinion that it is not the duty of the Tax Collector to look into matters of ownership as tax sales are always made in the name of the person to whom it is assessed regardless of who owns it. The record in my office did not show who owned the property and the tax records in the Probate Office didn't show.

"Therefore, I don't know whether the statements made by the Probate Judge are true and correct or not. Neither do I know whether the sale should be cancelled as erroneous.

"Please advise me what I should do in connection with a proposition of this kind, if anything."

The rent and sale contract mentioned in your letter is probably in the usual form of lease and sale contracts and as such the title for our purpose here is resting in the vendee. Also, I would presume from your letter that the vendee was in possession of the property. This, therefore, seems to indicate that the property was properly assessed in the name of the vendee. See **State vs. White Furniture Company**, 206 Ala. 575, 90 So. 896. This opinion was followed in an opinion of this office to Hon. W. M. Vaughan, Judge of Probate, Dallas County, on April 18, 1935, (Book 3-A, page 204).

Taxes are collected against the property rather than against the person of the owner of same. Therefore, the property is subject to a tax regardless of the owner (unless, of course, he comes within an exempt class). The taxes are a burden on the property. When these taxes are not paid, the property becomes subject to sale for said payment after notice in accordance with statute.

Section 2141 of the Code of Alabama of 1923 says in effect that tax sales are not void because of the manner of assessment. The proper and

valid objection to such sale is that the tax has been paid or that the property is exempt.

It is my opinion that the sale for non-payment of taxes in this case is valid if the procedure in regard thereto provided by statute has been followed. Of course, the vendor has an interest in the property which will entitle him to redeem under the redemption procedure provided by statute.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 2, 1939.

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton, Alabama.

Filing Tax —

(1) Deed of trust or mortgage given by a Water Works Board, which is a governmental agency of a municipality, to a National Bank, as trustee, for holders of the bonds, is subject to mortgage tax.

(2) Deed to Water Works Board, which is a governmental agency of a city, as grantee, is not subject to filing tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 31, 1938, in which you request my opinion as follows:

"(1) A Water Works Board of the City of Clanton was incorporated under Acts 1936-37, page 274, and said Water Works Board has filed in the office of the Judge of Probate a deed of trust or mortgage upon certain real estate and personal property, the deed of trust is made to the First National Bank, Trustees, for holders of bonds (the bank being the holder of the legal title and not the owner of the bonds), the amount of this instrument is $45,000.00.

"Will you please advise me whether or not I must collect mortgage tax upon this instrument, in view of the fact that the instrument is made to the First National Bank of Birmingham, as Trustees for the bond holders and also in view of the fact that the Water Works Board

is an adjunct of the City of Clanton. I would like to cite you to Section 2294(63), Michie's Code, Acts, 1927, page 550 and also the Opinions of the Attorney General, Volume 10 from January 1, 1938, through March 31, 1938, page 145, and also please refer to Volume 2, January 1, 1936, through March 31, 1936, page 239 and Acts 1932-1934, page 46.

"(2) The City of Clanton, a municipal corporation, files a deed in the office of the Judge of Probate for record to certain real estate, the grantee of this deed is the Water Works Board of the City of Clanton referred to above, and will you please advise me whether or not I should collect deed tax upon said deed?"

Before answering either one of your requests it becomes necessary to construe the Act of the Legislature approved March 2, 1937, General Acts 1936-37, page 274, and to decide whether or not a water works board formed or incorporated under this Act is a municipal agency.

I think it is. You will note that while the board has certain powers independent of the mayor and council of the city, yet the board of directors of such a corporation are appointed or elected by the mayor and council or any other governing board of such city or town and hold office concurrently with the mayor, president of the city commission or other head of such other governing body of said city or town. This is provided by Section 4 of said Act, which is as follows:

"Section 4. Each corporation formed hereunder shall have a Board of Directors, of not less than three members, which Board shall constitute the governing body of the corporation, and who shall serve without compensation, except they are to be reimbursed for actual expenses incurred in and about the performance of their duties hereunder. No member of the Board of Directors shall be an officer of the municipality. The directors of the corporation shall be appointed or elected by the Mayor and Council, city commission, or other governing body of such city or town, and shall hold office concurrently with the Mayor, President of city commission, or other head of such other governing body of such city or town."

I call your attention also to Section 1 of said Act, which provides as follows:

"Section 1. Whenever any number of natural persons, not less than three, said persons to be duly qualified electors and property owners of such City or town, shall file with the Mayor and council, city commission or other governing body of any city, or incorporated town, of the State of Alabama, an application in writing for a permit to apply for the incorporation in the manner hereinafter provided of a water works board of such city or incorporated town, and if such Mayor or council, city commission or other governing body of such city or incorporated town, shall deem it wise, expedient, necessary or advisable, that such corporation be forced and such Mayor and council, city commission or other governing body of such city or incorporated town, shall pass a resolution which shall be entered upon the minutes of such city or incorporated town, which said resolution shall provide that said Mayor and council, city commission or other governing body deems it expedient, wise and necessary, that said corporation be formed and authorizing

the persons making application to proceed to form such corporation, then such persons making such application shall proceed to execute, file and record a certificate as hereinafter provided for the purpose hereinafter set forward. No such corporation shall be formed without first making such application and the adoption of the resolution hereinbefore provided."

The above, to my mind, shows clearly that the legislative intent that any corporation formed under the provisions of this Act should be and is a governmental agency of the city or town for which it is organized.

I call your attention to Section 7 of said Act, where it says in part:

" * * * Provided that when the cost of construction of, and all indebtedness against, such plant has been fully paid, then such plant, together with all pipe lines, improvements and appurtenances thereto, and all other property, tangible and intangible including franchise or franchises, acquired, constructed, or installed, and rights-of-way, and all other property owned by said corporation shall become the property of such city or town and all rights of said corporation to and in the same shall immediately vest in such city or town, whereupon said corporation shall be automatically dissolved."

From the above, it is provided that when all the indebtedness of such board has been paid, including the cost of construction of all plants and including all of the indebtedness, then the property of all description and kind becomes automatically the property of the city or town, and this without any form of conveyance by the water works board by deed or other conveyance.

Taking the Act as a whole, we are, as stated above, convinced that such a board is an agency of the city or town where it is incorporated.

The first instrument to which you refer is a deed of trust or mortgage executed by the Water Works Board (which we hold to be a governmental agency of a city) to a National Bank, as trustee, for the holders of the bonds.

First it is necessary to determine if mortgages given by municipalities are exempt from filing tax under Section 63 of Act No. 478 (Acts 1927, page 550), which is Section 2294(63) of Michie's Code of 1928. In an opinion found in Quarterly Report of Attorney General, Vol. II, page 239, it was held that a mortgage made by a municipality is subject to proper filing tax. Said opinion held that Section 63 of Act No. 478, supra, was repealed by the Revenue Act of 1935, which omitted the exemption contained in Section 63. A later opinion in Quarterly Report of Attorney General, Vol. X, page 145, held contrary to the opinion in Vol. II, supra, but did not take into consideration the repeal of Section 63, supra, by the Revenue Act of 1935. Upon mature consideration, it is my opinion that the opinion in Vol. II, supra, is correct. Therefore, the opinion in Vol. X, supra, is hereby overruled and withdrawn.

Since mortgages given by municipalities are subject to filing tax, the question then presents itself as to whether the fact that the mortgage in

question was given to a National Bank, as trustee, for the bondholders would make it exempt. This question has heretofore been answered in the negative by this office in an opinion found in Biennial Report of the Attorney General, 1932-34, page 46. Said opinion held that when a national bank is a mere trustee in a mortgage to secure bonds, not owning any of the bonds in its own right, the mortgage tax must be collected before recording.

From the above it follows that your first inquiry must be answered in the affirmative.

The second instrument to which you refer is a deed to the Water Works Board of the City of Clanton, as grantee. The deed being filed by a governmental agency of a municipality, is exempt from filing tax. Quarterly Report of Attorney General, Vol. IV, page 28. Your second inquiry is, therefore, answered in the negative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 8, 1939.

Hon. W. T. Hanly,
Member of Board of Plumbers,
Examination & Registration of Alabama,
County Secretary,
156 South Ann Street,
Mobile, Alabama.

Plumbers — Licenses —

Under the fact stated, the Gas Service Corporation and its employees who perform the work are liable for violating Act No. 472, H. 409, approved September 13, 1935 (General Acts, 1935, page 995).

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion of January 31, 1939, which is as follows:

"In re of an act of Legislature Session of 1935 H. 409; Sec. 4 of this act excepts what it is not to apply on. This seems to except nothing inside a building, residence or structure. In fact the beginning of Sec. 4 specifically describes plumbing within a building etc. to three feet outside, then describes the plumbing from the outside of said building to the meters etc. Of which a portion is excepted under a provision that a Public Service Corporation is responsible therefor or the responsibility assumed by them.

"The Gas Service Corporation makes a contract for all the material and labor necessary to install hot water heaters and perform this contract. Said corporation having a State and County license as Contracting Plumbers also they have on file with the City of Mobile a bond as required by this City for Contracting Plumbers. But **they have not a licensed Master Plumber in their employ,** nor do **they employ licensed journeymen** as this act provides.

"The Mobile Gas Corporation furnishes an automatic hot water heater which is vented, and connected to the cold water supply within the house lines (after the said cold water line is past the City's water meter). The stop cock to control the water to the said heater is installed by the said Gas Corporation and a safety relief valve is installed and the necessary faucets for hot water.

"Please advise us if men employed by the Gas Service Corporation who do this work are liable under this act? And is the man who signs applications at City Plumbing Inspectors Office as the Master Plumber liable. Is the Gas Service Corporation liable?"

In my opinion, from the facts as stated in your letter, the Corporation and its employees, who do this work, are liable for violating Act No. 472, H. 409, approved September 13, 1935, (General Acts, 1935, p. 995).

Section 4 of the Act provides as follows:

"The word 'plumbing' within the meaning and for the purpose of this Act shall be held to mean and include: (a) All piping, fixtures, appliances, and appurtenances in connection with the drainage, ventilation of the same or water supply system within a building, residence or structure to a point from three to five feet outside of the same. (b) The construction and connection of any drain or waste pipe carrying domestic sewerage from a point within three feet to five feet of the outside walls of any building, residence or structure with the sewer service or other disposal terminal, and the alteration of any such system drain or waste pipe, except the construction of sewer mains and branches by public utilities or municipalities where the responsibility is their's or assumed by them. (c) The water service piping from a building, residence or structure to the mains in street, alley or other terminal, except the tapping of water mains, the service to the street, curb or building line, the setting of meters and boxes by public utilities or municipalities where the responsibility is their's or assumed by them. (d) A plumbing and drainage system so designed and vent piping so installed as to keep the air within the system in free circulation and movement, and to prevent with a margin of safety unequal air pressure of such force as might blow, siphon or effect trap seals, or retard the discharge from plumbing fixtures or permit sewer air to escape into the building, residence or structure. A 'journeyman plumber' within the meaning and for the purpose of this Act shall be held to mean and to include any person other than a master plumber, who, as his principal occupation, is learned in the actual, practical, physical installation of plumbing as a handicraft or trade. A 'master plumber' within the meaning and for the purposes of this Act shall be held to mean and to include any person, firm or corporation engaged in or proposing to engage in the business of contracting to do or superintending the installation of plumbing, either or both; but if such applicant for registration be an individual,

he must either qualify himself to be a licensed master plumber or must continually keep in his active employ a duly registered and licensed master plumber; and if such licensee be a firm or corporation, at least one active member of such firm or corporation must be a duly registered master plumber, actively continuously connected with the conduct of said business."

The Corporation by contracting for the installation of the water heaters, and installing the same, is engaging in the "plumbing" business as defined by the Act, supra, without complying with the requirements of said statute.

Section 13 of the Act provides as follows:

"Any person who shall engage in the business of master plumber, or in the trade of journeyman plumber for compensation valuable consideration or reward in any such county without first obtaining the license required by this Act, or who shall violate any other provision of this Act, or who shall knowingly and willfully make any false statement to the Board concerning his application to or his examination by the Board, with intent to deceive shall be guilty of misdemeanor, and in addition to the revocation of his license by the Board, shall be fined not less than ten ($10.00) dollars, and not more than five hundred ($500.00) dollars for each offense, and each days violation shall constitute a separate offense."

In my opinion, "any person" as used in Section 13, supra, includes corporations as, in the definition of a "master plumber," the corporation licensee is specifically provided for, which to my mind shows the intention to include corporations in all pertinent provisions of the Act.

" * * * The general rule today would seem to be, as laid down by the Supreme Court of Colorado, that 'prima facie, the word "person" in a penal statute which is intended to inhibit an act, means "person in law" (that is, an artificial as well as a natural person), and therefore includes corporations, if they are within the spirit and purpose of statute.'" **Fletcher Cyclopedia Corporations, Vol. 10, Sec. 4948, page 662.**

"In statutes defining crimes the prohibition is frequently directed against any 'person' who commits the prohibited act, and it is well settled, as in other cases where the word 'person' is used, that although such word does not necessarily include a corporation, it may be, and usually is, construed to include a corporation so as to bring it within the prohibition of the statute and subject it to punishment." **13 American Jurisprudence, Section 1135, p. 1059.**

See also **Words & Phrases, Vol. III, 2nd Series, at page 985.**

A violation of Section 13, supra, is a misdemeanor, and is punishable by a fine, therefore, in my opinion, the Corporation may be subject to criminal prosecution under said section.

The agents or employees of the corporation are doing business for the corporation when, as a matter of fact, the corporation does not have au-

thority, because of its failure to secure a license under the Act, to do said business or to authorize its agents or employees to perform said acts and, therefore, in my opinion the agents and employees are liable for violating Act No. 472, supra.

In the case of **Nashville, Chattanooga & St. Louis Railway v. City of Attalla,** 118 Ala. 362, our Supreme Court said:

> "We are clearly of the opinion that it was competent for the legislature to confer the power upon the town of Attalla to impose a license tax upon business and professions, and it seems to be the settled law in this State, that an agent may be prosecuted for engaging in the business for which his principal has not taken out a license. — Elsberry v. The State, 52 Ala. 8; Ex parte City Council of Montgomery, 64 Ala. 463; City Council v. Shoemaker, 51 Ala. 114; Ex parte Schmidt, 2 Tex. App. 196; Abel v. The State, supra. Many other cases might be cited."

This office, in an opinion to Hon. F. T. Flowers, under date of January 9, 1939, held that the acquiring of a State and County license alone does not permit persons to engage in business as plumbers in Mobile County, Alabama. A copy of said opinion is enclosed for your information.

The premises considered, it is my opinion, under the facts as stated in your request, that the Gas Service Corporation and its employees performing this work, are liable for violating Act No. 472, H. 409, approved September 13, 1935 (General Acts, 1935, page 995).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 8, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Russell County — Deputy Solicitors —

Deputy Solicitor of Russell County is to be paid out of the general fund of the county and not out of the county court fund.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your request of February 14, 1939, for official opinion, which request is as follows:

> "Please refer to Local Act (Local Acts 1936-37, page 22), Section 2569, 3738, 5512 and 5523, Code of Alabama, 1923, opinion of the Attorney

General, Quarterly Reports, Volume VII, page 56, and Volume X, page 22, and advise me as follows:

"1. Would the salary of the Deputy Solicitor of Russell County be payable from such County Court Fund?

"2. If your answer is in the affirmative, would such salary be a prior claim to officers' and witness' fees, payable from such fund?

"3. What is the meaning of the word 'Maintenance' as used in Section 10, of such Local Act?"

Section 5523 of the Code of Alabama of 1923 specifies that the salary of deputy solicitors shall be paid out of the county treasury, etc. This is a general regulation and as such will be applicable to all deputy solicitors unless there is specific legislation taking them out of this general regulation. Section 4 of H. B. 212, Local Acts of 1936-37, page 22, establishes additional duties for the deputy solicitor of the Circuit Court of Russell County but does not provide for his payment out of any fund established by this Act. It only says that his salary as deputy solicitor for the Circuit Court shall not be increased by the reason of his duties imposed by this particular Act. Therefore, since there is nowhere in this Act a specific regulation concerning the payment of the salary of the deputy solicitor, he is, in my opinion, to be paid in accordance with Code Section 5523, cited above.

In your third question you ask the meaning of the word "maintenance" as used in Section 10. I am of the opinion that this word is to be given the usually accepted definition of such word, that is, to take care of necessaries and conveniences of the court, the fees as set out in the Act creating this court and other expenses which are usually necessary to carry on a court. However, this maintenance cannot be construed, in my opinion, as including the payment of the salary of the deputy solicitor. The deputy solicitor already has imposed upon him the duty of serving the inferior courts of the county in the State's behalf, and this in reality is not an imposition of a greater duty, since certain inferior courts are dispensed with by the creation of the County Court of Russell County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 8, 1939.

Hon. L. C. Walker,
Judge of Probate,
Shelby County,
Columbiana, Alabama.

Elections — Absentee Ballots —

Probate Judge not required to furnish ballots to absentee voters in municipal elections held at a different time from general State,

county, Federal or municipal elections, under Section 485, Code of Alabama, 1923.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of February 27, 1939, in which you request my opinion as follows:

"The Mayor of Columbiana has called an election to be held on March 14, to submit to the qualified voters the question of whether or not the town shall adopt a commission form of government.

"I have received several requests for Absentee ballots, but none have been furnished me. The Mayor is out of the state and the City Clerk has charge of and is distributing Absentee ballots. He refuses to supply me with ballots contending that sec. 485 of the Code, rather than the sec. 407, applies to this election. I would thank you to please advise me as to my duty in the premises."

Sections 407 and 485 of the Code of Alabama of 1923 are as follows:

"407. Ballots, etc., delivered to probate judge. — Not less than thirty-one days from the time of the holding of any general, special or municipal election, authorized by law, the officers charged with the printing and distribution of the official ballots shall cause to be delivered to the probate judge of each county in which said election is held a sufficient number of ballots and other printed matter required hereunder."

"485. Municipal elections; how provided for. — In case of any municipal election held at a time different from a general, state or federal election, the duties herein prescribed for the judge of probate in respect to receiving nominations, printing and distributing ballots and cards of instructions shall be discharged under the same sanctions by the mayor or other chief executive officer of the city or town."

It is my opinion that Section 407 is a general statute applicable to the general elections of the State, county and city. My judgment is that Section 485 is a special statute dealing with municipal elections held at a time different from general State or Federal elections. Special provisions relating to specific subjects control over general. **Herring vs. Griffin,** 211 Ala. 225. The effect of the special statute will be to relieve you of your duties as set out in the general statute when the election is of the type defined in the special statute.

Therefore, it is my opinion that under the circumstances about which you inquire, you are relieved of your duties in regard to absentee ballots, and your duties are to be discharged by the mayor or other chief executive officer of the city, since it appears that the election in your inquiry would come under Section 485, Code of 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 9, 1939.

Hon. H. G. Caudle,
Executive Assistant,
County Board of Education,
Jefferson County,
Birmingham, Alabama.

Lubricating Oil Excise Tax — County board of Education not liable for State tax of 2c per gallon on lubricating oil. (Schedule 138 of Revenue Laws, 1935).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 14, 1939, in which you request my opinion as follows:

"We recently asked our County Attorney for an opinion as to whether or not we were liable for state tax of two cents per gallon on lubricating oils. I quote you his opinion:

" 'Schedule 138 of the General Revenue Act of Alabama of 1935 provides for this tax upon lubricating oils (1935 General Acts 494). Ordinarily a tax levy in general terms does not include municipal corporations unless clearly indicating a contrary intention. In other words a tax levy is not to be construed as intending to place a levy upon a municipality unless the wording of the Act expressly shows that such was the intention. **(City of Birmingham vs. State ex rel Carmichael, Attorney General,** 170 So. 64). The same rule which applies to municipalities also applies to state educational institutions, and a tax levy which does not clearly indicate that boards of education should be taxed will be construed as meaning that it should not be taxed. Schedule 138 of the General Revenue Act of 1935 defines "persons, corporations, copartnerships, companies, agencies or associations, singular or plural." It is therefore clear that boards of education were not intended to be within the purview of this tax statute, and I am, therefore, of the opinion that you are not liable therefor.'

"We buy our oil on annual contract, and, after receiving this opinion from the County Attorney, we forwarded a copy to the Sinclair Refining Company who has the contract for the current year and they in turn passed it on to their attorneys and I am enclosing herewith a copy of letter received from their General Agent giving their attorney's opinion.

"We shall appreciate your rendering us an opinion as to our liability and at as early a date as possible."

In my opinion, county boards of education are not required to pay the lubricating oil tax levied by Schedule 138 of the Revenue Laws of 1935.

This Schedule is as follows:

"SCHEDULE 138. As used in this Act, the term 'lubricating oil' shall include any devices or substitutes therefor, commonly used in lubri-

cating or oiling engines, bearings, journals, axles, hubs and other parts of machinery; provided, however, that nothing contained in this Act shall be held to apply to those products known commercially as 'kerosene oil', 'fuel oil', or 'crude oil'. The word 'person' shall include persons, corporations, co-partnerships, companies, agencies, or associations, singular or plural. The term 'distributor' shall include any person or manufacturer who engages in the selling of lubricating oil in this State by wholesale domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The term 'retail dealer' shall include any person herein defined as distributor who is also engaged in the selling of lubricating oils in this State at any place in this State in broken quantities. The term 'storer' as herein used shall include any person who ships, causes to be shipped or brings into this State, or manufactures in this State, lubricating oils as herein defined, in any quantity, stores the same in any container and withdraws same from storage for any purpose."

This office has heretofore held that a county board of education is "a quasi corporation and constitutes in fact an independent agency of the State for the purposes enumerated * * *" in the statutes. **Kimmons v. Jefferson County Board of Education,** 204 Ala. 384. Opinion to State Highway Planning Survey dated September 20, 1937, Quarterly Report of Attorney General, Vol. VIII, page 263.

Schedule 138 of the Revenue Act, supra, is similar in its terms to the gasoline tax statute considered by the Supreme Court of Alabama in **State v. City of Montgomery,** 228 Ala. 93, 151 So. 856. In that case the Supreme Court held that a city was not within the purview of the tax statute, laying down the general principle that "when a tax is laid in general terms with nothing to indicate that it was intended to apply to a city or county, it will be held not so to apply," citing **Huntsville v. Madison County,** 166 Ala. 389, 52 So. 326; **Van Brocklin v. Anderson,** 117 U. S. 151, 29 Law. Ed. 845.

In view of this announced principle, it is my opinion that there was no legislative intent of levying the lubricating oils tax upon purchase by the county boards of education of lubricating oils. You will note that Schedule 138 levies the tax on persons, corporations, co-partnerships, companies, agencies or associations, singular or plural. There can be no doubt that the county board of education is not a "person" within the meaning and intent of said Schedule 138, nor is it a "corporation" in the sense of the term as there used. The very category in which the word "corporation" is placed—"persons, corporations, co-partnerships, companies, agencies or associations, singular or plural"—shows this.

However, if the county board of education buys lubricating oil in this state from a "retail dealer" or "distributor", the retail dealer or distributor must pay the tax. In such case the seller and not the buyer pays the tax. He may sell his lubricating oil at any price he sees fit. The State is not interested in that. The tax can be paid to the State only.

It is stated in **State v. City of Montgomery,** 228 Ala. 93, supra:

"There is no infringement of this principle (that when a tax levy is laid in general terms with nothing to indicate that it was intended to apply to a city or county, it will be held not so to apply) to hold

that when a city (or any State agency, we interpolate) buys gasoline from a dealer who is subject to the tax, the amount of it should not be deducted. The tax is imposed on the dealer and not on the city in that transaction, though it incidentally is paid in the amount of the purchase price. **Orange State Oil Co. v. Amos,** 100 Fla. 844, 130 So. 707."

The principle is also stated in the City of Montgomery case that the implied exemption of the city or county from the tax levied is based upon the theory that the agency of the State sought to be taxed must levy a tax to pay the tax and that the courts will not ordinarily presume that it was the legislative intention to levy a tax upon such State agency.

You are therefore advised that where the county board of education causes the lubricating oil to be shipped into the State, where it stores the same, and withdraws it from storage, it would not be liable for the tax levied by Schedule 138, supra. However, where lubricating oil is purchased from a local retail dealer, the county board of education cannot object because the amount of the tax is included in the purchase price by such retail dealer or distributor who is, in fact, the taxpayer. Cf. Opinion, Biennial Report of Attorney General, 1928-30, page 547. Also opinion of the Attorney General Vol. VIII, Office Ed., page 283, dated February 18, 1932, and opinion of the Attorney General, Vol. IX, Office Ed., page 23, dated March 2, 1932.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 9, 1939.

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Filing Tax — Mortgage tax, as provided by Schedule 94 of Section 348, General Acts of Alabama, 1935, collectible on chattel mortgage given to Jas. B. Little, as Superintendent of Banks, State of Alabama, liquidating W. R. Rison Banking Company.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your request for official opinion under date of February 21, 1939, which is as follows:

"Please give me your official opinion as to whether or not a chattel mortgage payable to 'James B. Little, as Superintendent of Banks of the State of Alabama, Liquidating W. R. Rison Banking Company,' should bear the filing tax as provided by Section 348, Schedule 94 G. A. 1935, page 477."

This office has ruled that such a mortgage is clearly subject to Section 4½ of Act 172, approved August 22, 1923. The mortgage is not given to the State nor for the benefit of the State. It is given for the benefit of the Bank, its stockholders and creditors and is in no way excepted or exempted from the payment of the filing tax provided by Section 4½. Opinion to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County under date of September 22, 1933, appearing in Office Edition, Opinions of Attorney General, Volume 15, page 193.

Section 4½ of Act No. 172, approved August 22, 1923 is equivalent to Schedule 94 of Section 348, General Acts of Alabama, 1935. Therefore, it is my opinion that the rule stated above is applicable to the instrument in question, and a mortgage tax should be collected as provided by said Schedule 94 of Section 348.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 9, 1939.

Hon. J. C. Kellett,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

County public buildings — Interest-bearing warrants—

The county courts of commissioners authorized to issue interest-bearing warrants for construction of public buildings.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of February 23, 1939, in which you request my opinion as follows:

"DeKalb County is contemplating, and, in fact, has an approved project by the Works Progress Administration, for the erection of a county activity building, said building to be erected on lands owned by DeKalb County and said building to be used to house the Department of Education, the Farm Extension Service and the Health Unit of the county. To erect this building the county will be called upon to make a cash outlay of approximately Fifteen Thousand Dollars as its contribution to the project. The courthouse in DeKalb County is badly in need of some Ten to Fifteen Thousand Dollars in repairs and the county owns a warehouse in which county machinery and other county property is stored which is, also, in need of some One or Two Thousand Dollars in repairs.

"Please advise me if the Commissioners' Court of this county has authority to issue interest bearing warrants to finance the above mentioned projects, said warrants to be repaid over a period of not less than five years, providing the amount borrowed does not cause the county's indebtedness to exceed the constitutional debt limit. Also, can we pledge the income, or a sufficient amount of the income, received under the two and one-half mills as provided for in Section 215 of the Constitution of 1901 and Section 213 of the Code. I will thank you to let me have an early opinion on this as we will be ready to start this project within the next three weeks."

The first consideration of your problem is the ascertainment of the authority of the county to construct such buildings as mentioned in your request.

It was said in **State ex rel Day v. Bowles, et al.,** 217 Ala. 458, that the county is a unit of the government invested with legislative, judicial and executive or administrative powers conferred by legislation, including the power to erect public buildings. Among the powers conferred and duties imposed by legislation is that of erecting, furnishing and equipping necessary public buildings. It was said in the case of **Board of Revenue of Covington County v. Merrill,** 193 Ala. 521, that the duty to erect and maintain public buildings for the county is mandatory on courts of county commissioners and boards of revenue.

In the location, erection, repair, removal or the furnishing of the county's public buildings, the commissioners' court or board of revenue exercises discretion that cannot be exercised for them. In the performance of such duties they exercise a function that is quasi legislative, and their actions in this behalf when free from fraud, corruption or any unfair dealings cannot be controlled or reversed by any other court. As authority for this statement, I refer you to **Matkin v. Marengo County,** 137 Ala. 155, 34 So. 171; **Hayes v. Ahlrichs,** 115 Ala. 239, 22 So. 456; **Parnell v. Commissioners Court,** 34 Ala. 278; **Commissioners Court v. Bowie,** 34 Ala. 461; **Moore v. Hancock,** 11 Ala. 245; **White v. Hewlett,** 143 Ala. 347, 42 So. 78.

Furthermore, Section 212 of the Code gives the authority to erect public buildings for the county to the county commissioners and boards of revenue. The final authority as to the necessity of building the public buildings rests with the court of commissioners. It has even been held in an opinion of this office in Biennial Report of Attorney General, 1934-36, page 201, that the county can legally appropriate money to build a market house for the purpose of promoting agriculture. Also see opinion of this office in the same publication cited above at page 665, where the courts of commissioners were given the authority to levy a special tax under Section 213, Code of Alabama of 1923, to purchase a lot on which to erect a jail and other public buildings.

This, therefore, in my opinion, establishes the right of the court of county commissioners to erect such public buildings as you inquire about in your request.

The taxes levied under Section 215 of the Constitution are said to be levied for a specific purpose, i. e., buildings and roads. This section says:

"215. No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum; provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

The above section authorizes an accumulation of a special fund for the specific purposes as set out in the above section. Among them is the maintenance and construction of public buildings. This fund is designated as the road fund for the purpose of this discussion.

This office has heretofore held that the County Financial Control Act (General Acts, 1935, page 803) does not apply to the Road and Bridge Fund of the county.

The limitation is on the general fund of the county and does not apply to a specific fund such as the road fund authorized by Section 215 of the Constitution of 1901, supra. It is said in an opinion of this office to Hon. S. P. Poyner, Judge of Probate, Houston County, Vol. VII, Quarterly Reports of Attorney General, page 8, that the County Financial Control Act is not applicable to revenues derived from the proceeds of a tax levied for the purpose of erection, construction or maintenance of necessary public buildings or bridges or roads as provided for in Section 215 of the Constitution, 1901. This particular opinion was as to the authority of Houston County to issue interest-bearing warrants for the purpose of erecting a jail. Also in the same volume of the Opinions of the Attorney General cited above at page 137, it was held that the purchase price of lands upon which to erect public buildings may be provided for by issuance of interest-bearing warrants payable out of the 2.5 mill tax provided for under Section 215 of the Constitution. I refer you also to Vol. V, Opinions of the Attorney General, page 232, for a further discussion of this proposition.

In the Quarterly Report of Attorney General, Vol. VII, page 137, it was held that the purchase price for land upon which to erect public buildings may be provided for by issuance of interest-bearing warrants payable out of the 2.5 mill tax provided for in Section 215 of the Constitution of 1901.

Therefore, I am of the opinion that the county court of commissioners may legally issue interest-bearing warrants to be paid out of funds authorized by Section 215 of the Constitution of 1901 for the purpose of constructing public buildings.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 15, 1939.

Hon Frank Head,
Register, Circuit Court,
Shelby County,
Columbiana, Alabama.

Trial Tax — Suit originating on the law side and transferred to the equity side upon order of the court or upon motion of the suitors at law, held not to require trial tax on both law and equity sides of the circuit court.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 2, 1939, in which you request my opinion as follows:

"Will you kindly advise me as to whether two trial taxes should be charged when a civil case is transferred from the law side of the Circuit Court to the equity side of the Circuit Court?

"I have a case which originated in the law side of the court of Shelby County and, by order of the trial Judge, was transferred into the equity side. Now the parties are attempting to settle the case and contend that only one trial tax should be charged. I am charging a trial tax of $3.00 and the Circuit Clerk is charging $3.00. Kindly give me an advisory opinion on this at your earliest convenience."

In reply, I wish to advise you that in my opinion, under the facts stated, no trial tax is chargeable by the register in chancery. The trial tax is imposed upon every original case that goes upon the docket of any circuit court. See Biennial Report of Attorney General, 1932-34, page 390; Quarterly Report of Attorney General, Vol. V, page 11.

The question then arises concerning whether or not a case originally filed on the law side and transferred to the equity side of the circuit court is an original case for the purpose of taxing costs. I call your attention to Sections 6489-6490, Code of 1923, which provides for the transfer of causes from the law side to the equity side of the court. These sections provide that after the transfer the case shall be docketed and proceed in equity. In my judgment, this remedy falls within the same classification as extraordinary remedies providing for the aid of suitors at law, and no original or new case has been docketed. The trial tax is chargeable only on original cases and could not be properly charged twice in this the same case. The transfer to the equity side is merely an additional remedy afforded the suitors at law and does not impose the additional burden of a new trial tax since it is not an original suit.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 15, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Taxation — Record filing tax —

Where joint owners procured partition of lands by final decree of court of competent jurisdiction, and thereafter each executed deed to the other purporting to convey the whole estate in the tracts as partitioned by the decree, upon the offering of said deeds for recordation, record filing tax must be paid upon the value of the interest purported to be conveyed in said deeds.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of inquiry as follows:

"Two deeds have been presented to me for recording, and before accepting same, it will be greatly appreciated if you will give me an opinion of the amount of the State Tax on Deeds to be required by me. The facts are as stated in the following paragraph.

"Mrs. Beulah Gerson and Mrs. Stella G. Greil owned jointly a large tract of land in Elmore County each owning an undivided one-half interest therein. The lands were the subject of a suit for partition in the Circuit Court of Elmore County, in Equity, and a decree was rendered dividing the tract into two portions, equal in value, and one of said portions was allotted to each of the said joint-owners. By decree of the Court, the title in each portion was vested in the former joint-owner to whom it was allotted and divested from the other.

"After the rendering of this decree, Mrs. Greil and Mrs. Gerson exchanged deeds, which merely confirmed the division. A copy of one of the deeds is attached hereto, and the other deed is in the same form with grantor and grantee reversed.

"It is the contention of the parties presenting these two deeds for recording that no title is passed by either of the deeds, as it was already conveyed and vested by the decree of the Circuit Court, and that only a nominal 50c deed-tax should be collected by me. In fact, these deeds are not really necessary to perfect the titles, but are merely to place something upon the Probate Records showing that the partition of the Circuit Court was satisfactory to each of the parties.

"Please give me your opinion of the correctness of the above contention."

In my opinion, if the deeds executed by the joint owners, each to the other, to the tracts of land which theretofore had been partitioned by the

decree of court, the record filing tax accrues on the value of the interest in the real estate, which the deeds purport to convey.

Provisions for exemptions from taxation must be construed strictissimi juris. **State v. Wright, 224 Ala. 357; Hawkins, Probate Judge v. Pure Oil Co., 232 Ala. 660.**

Schedule 46 of Section 348 of the Revenue Act of 1935, imposes a tax upon the recordation of deeds, excepting therefrom "deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate." Strictly construing this provision of law, in its application to the situation detailed in your request, it is my opinion that deeds executed under the circumstances there set forth do not fall within the influence of the exemption provisions. Cf. Quarterly Report of the Attorney General, Vol. XIII, page 56.

Inasmuch as the deeds purport to convey an undivided one-half interest in each of the tracts, the proper measure of tax to be assessed and collected upon the recordation of the instrument is the value of the one-half undivided interest which each deed purports to convey. Quarterly Report of Attorney General, Vol. II, page 49.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 15, 1939.

Hon. M. E. McConnell,
Judge of Probate,
Sumter County,
Livingston, Alabama.

Filing Tax — Deed filing tax based upon actual fair market value of property at the date of the execution of the deed.

Accordingly, deed executed in 1931 and recorded in 1939, deed tax should be computed on value of property conveyed as of 1931.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your request for official opinion dated February 17, 1939, which is as follows:

"I am enclosing you a copy of a deed I have just recorded, upon which I charged a deed tax of $32.50. The value of the property in this deed, situated in Sumter County, Alabama, is $32,500.00 for the tax year 1938.

"This deed was given in 1931, since that time there have been two nice residences built on this property. The valuation of $32,500.00 includes the value of the two residences.

"There is some doubt in my mind as to whether my charge was correct or not. I would appreciate very much your advising me the correct amount of deed tax due on this instrument."

It is my conclusion that the deed filing tax which should have been charged upon the instrument in question when offered for record should have been computed on the value of the interest conveyed at the date of the conveyance.

This office has ruled in construing Schedule 46 of Section 348 of the 1935 Revenue Act, General Acts of Alabama, 1935, page 456, that the filing tax is based upon the real value of the property **at the date of the execution of the deed.** Opinion rendered to Hon. John T. Frazer, Judge of Probate, Lee County, February 27, 1939, appearing in opinions of Attorney General, Office Edition, Book 2-B, Quarterly Reports of Attorney General, Vol. I, page 66; Biennial Reports, Attorney General, 1928-30, page 210. Therefore, it is my opinion that the filing tax you should have collected should have been based upon the value of the property as of December 22, 1931 (the date of execution of the deed), and not as of 1938.

This office held in the opinion to Hon. John T. Frazer, supra, that the yardstick to be used in determining the amount of filing tax to be charged for the recordation of deeds is the actual fair market value of the property conveyed by the deed, which is not necessarily the consideration recited in the deed, nor the valuation of the property as fixed by the records of the Tax Assessor.

By applying this rule, you can compute the amount of deed tax due on said instrument by determining the actual fair market value of the property situated in Sumter County as of 1931.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 15, 1939

Hon. Frank B. Embry,
Circuit Solicitor,
Sixteenth Judicial Circuit,
Pell City, Alabama.

Deputy Solicitor —

Local Act providing for salary of Deputy Solicitor of St. Clair County violates Section 105 of the Constitution prohibiting enactment of local law provided for by general law.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 21, 1939, in which you request my opinion as follows:

> "Please give me an opinion on the following matter. Section 5523 of the Code of 1923 fixes the salary of Deputy Solicitors in all the Counties of the State and provides that in Counties having two courthouses the Deputy shall be paid the sum of $1500.00 annually. At a session of the Legislature in 1936 the local law was passed reducing the salary of the Deputy Solicitor in this county (St. Clair) to $100.00 per month. The local act seems to be forbidden by Section 105 of the Constitution of 1901 as that Section has been construed by the Courts. I call your attention to Evans vs. Long, 149 Sou. 837 and Acuff, County Treasurer vs. Weaver, 86 Sou. 167.
>
> "Please advise me whether or not the Local Act is unconstitutional."

I presume that the Local Act to which you refer is Act No. 294, Local Acts, 1935, page 188, Section 1 of which provides as follows:

> "That the salary of the deputy solicitor for St. Clair County, Alabama, be and the same is hereby fixed at $1200 per annum, payable in equal installments and the Probate Judge of St. Clair County, Alabama, is hereby directed to issue a warrant on the Treasury of St. Clair County, Alabama, payable to said Deputy Solicitor for such salary."

In my opinion, the foregoing Local Act is violative of the Constitution of 1901, Section 105.

In principle, the case of **Acuff v. Weaver,** 17 Ala. App. 532, 86 So. 167, (containing response by the Supreme Court to inquiry by the Court of Appeals) is not distinguishable and must be here considered as controlling. There the compensation of the Judge of the County Court for Shelby County under the provisions of the general law was $450.00 per annum. Under the Local Act it was fixed at $1200.00. In the instant case, the salary of the Deputy Solicitor of St. Clair County is fixed by Section 5523 of the Code of Alabama, 1923, as follows:

> " * * * In counties where circuit or county court is held at more than one place in said county, the deputy solicitor shall receive an annual salary of $1500, payable in the same manner as other deputy solicitors are paid * * * ."

By the Local Act, supra, the salary is reduced to $1200.00. The holding in **Acuff v. Weaver,** supra, was that the subject matter of the two Acts, i. e., the Local Act and the General Act, both fixing the salary of the Judge of the County Court, was the same, and, the question of compensation having been provided for by general law, the Local Act contravened Section 105 of the Constitution. Section 105 (so far as here pertinent) prohibits, with the exception of laws fixing the time of holding courts, the enactment of any

special, private or local law which is provided for by a general law. The Acuff case has been followed with approval in the comparatively recent case of **Evans v. Long, 149 So. 837.**

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 15, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Costs and Fees — Judgment in misdemeanor cases should include judgment for costs. If there is no judgment for costs, execution could not issue for same, and therefore, said costs cannot be paid from fine and forfeiture fund or other county funds.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 2, 1939, in which you request my opinion as follows:

"Please refer to the following:

" 'The offense committed is a Misdemeanor, punishable by fine, and in addition to such fine, on conviction, the Defendant may also be sentenced to Jail or Hard Labor. The defendant is found guilty and the Court enters the following order: "Adjudged guilty of.....and sentenced to.....days Hard Labor for the County" ';

"and advise me as follows:

"1. Is the judgment of the Court in this instance a proper and legal judgment?

"2. If your answer to Question No. 1 is in the negative, what is the duty of an Examiner of Accounts, examining such Court, when such a condition prevails?

"3. Could the Defendant, in addition to the above sentence, also be sentenced to Hard Labor to pay the Costs, and if so, is it mandatory that he be sentenced to Hard Labor, as provided by law, for a sufficient number of days to pay the Costs?

"4. Could execution legally issue for the costs in such a case, and if so, would the fees of Officers and Witnesses be a legal claim against the Fine and Forfeiture Fund?

"5. If execution cannot legally issue, would the fees of officers and witnesses be payable from any fund of the County?"

The matter set out above appears to be the bench notes of the trial judge. However, in answering your inquiry it will be assumed that same is the only judgment in the case.

Such a judgment is incomplete. It is proper as to the fine and additional hard labor sentence, but also should contain a judgment for costs. **McAulley v. State,** 22 Ala. App. 263, 114 So. 631. — **Section 5290 and 5291, Code of 1923.** If it did contain a judgment for cost, the defendant should be sentenced to hard labor to pay said cost unless same are presently paid or judgment confessed therefor. **Section 5291,** supra.

The above answers your first and third inquiries.

In answer to your second inquiry, it is my opinion that the examiners are without authority to make a charge against the judge.

In answer to your fourth and fifth inquiries, it is my opinion that execution could not issue for the costs unless there is a judgment for said costs. There being no judgment upon which execution could issue, it follows that same could not be collected from the fine and forfeiture fund of the county or its equivalent. **Quarterly Report of Attorney General,** Vol. II, page 118; **Hendon v. Delvichio,** 137 Ala. 594. Also, said cost could not be paid out of any other fund of the county.

In such an instance said cost could not be paid by the Convict Department. **Quarterly Report of Attorney General,** Vol. VIII, page 161.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 15, 1939.

Hon. O. L. Andrews,
Clerk, Circuit Court,
Jefferson County,
Birmingham, Alabama.

Unemployment Compensation Commission — Fines —

Fines for violation of Section 15(a) of the Alabama Unemployment Compensation Act, General Acts of Alabama, 1935, page 950, held payable to Alabama Unemployment Compensation Commission for the use and benefit of the Alabama Unemployment Compensation Commission Administration Fund.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of February 1, 1939, in which you request my opinion as follows:

"Will you please give me an opinion as to whom I am to pay fines in criminal cases where defendants are convicted of violating Section 15A of the Alabama Unemployment Compensation Act.

"I will appreciate your prompt attention to this as I have some money already collected and cannot disburse it until I get an opinion from you."

In reply, I wish to advise you that fines for violating Section 15(a) of the Alabama Unemployment Compensation Act should be paid directly to the Alabama Unemployment Compensation Commission, as provided for by the Acts of 1935, page 966, Section 15(d), which provides as follows:

"(d) On complaint of the Commission, the fine specified or provided in this section may be collected by the State in an action for debt. All fines thus collected should be paid to the Unemployment Administration Fund."

I wish to further call your attention to Section 16, which provides for the Alabama Unemployment Compensation Administration Fund and provides that this special fund shall be handled by the State Treasurer as other State moneys are handled, but that it shall be expended solely for the administration of the Alabama Unemployment Compensation Act and the purposes therein specified.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 15, 1939.

Hon. H. W. McKenzie,
Treasurer, Marion County,
Hamilton, Alabama.

Witness fees — Clerk cannot issue an execution for costs unless there was a judgment for same. Accordingly, there is no provision for payment of witness fees unless there is a judgment for the costs.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your request for official opinion as follows:

"Where a case has been tried and convicted and sentenced for a term in Jail. Can the Clerk issue an execution for the cost in this case when the Judge did not write up the order for an execution.

"I want to know how I can pay the witnesses in these kind of cases?

"I understand I can pay witness in cases when there has been an execution issued and returned no property found. But in this case there has been no execution issued and the Clerk thinks he has no right to issue an execution unless it was in the order of the Judge's decree.

"The order of the Court in the case in question is as follows:

"November 4th, 1938, State Solicitor files his complaint on appeal. Defendant pleads guilty to and is adjudged guilty of having had possession of prohibited liquors contrary to law as charged, and it is ordered that defendant pay a fine of $50.00, defendant failing to pay the fine assessed against him it is ordered that he be imprisoned in the jail of Marion County for 20 days to pay said fine."

It is my conclusion that the Clerk cannot issue an execution for the costs under the order of the court in question.

From the facts stated, it appears that there was no judgment for the costs rendered by the court, and, accordingly, no execution legally could issue for same. **Reports of Attorney General, Office Edition, Vol. III, page 112.**

Section 3763 of the Code of Alabama, 1923, in so far as it is applicable to your question, is as follows:

"The fees of witnesses subpoenaed on the part of the State to appear * * * before any court in which a criminal prosecution is pending, must be taxed against the defendant, if he is convicted, * * * if the costs are imposed on * * * the defendant * * * and an execution against him for the same is returned 'no property found' * * * such fees must be paid by the County in the manner specified in section 3769."

Section 3769 is as follows:

"3769. Witness' certificate; how payable; clerk not entitled to fee for issuing. — It is the duty of the clerk of the court to issue a certificate to each witness appearing on the part of the state, stating therein the amount of compensation to which he is entitled, the facts which, under the provisions of section 3763 (6660), make it a good claim against the county, which certificate is payable by the treasurer out of any fines and forfeitures in the county treasury; the clerk who issues the certificate hereinabove mentioned shall not be entitled to demand or charge any fee for performing this duty."

It will be noted that the fees of witnesses attach against the defendant on conviction as part of the costs, and that the prerequisite to payment of witness fees out of the Fine and Forfeiture Fund is that execution must be

returned "no property found." Inasmuch as no execution can issue legally for the reason stated above, it naturally follows that there is no manner for payment of the fees of witnesses in the case of question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 15, 1939.

Hon B. P. Singleton,
State Comptroller,
Capitol.

Probate Judge: A claim filed for mileage by a Probate Judge for ex officio services rendered in connection with public roads is not a legal claim against a county where the Probate Judge is already receiving the maximum of $400.00 allowed him for his ex officio duties in relation to public roads.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated March 6, 1939, which is as follows:

"A Judge of Probate has filed and been paid claims for mileage on trips to Montgomery for conference with the State Highway Department and for other trips to various places securing right of way deeds and attending to other matters in relation to public roads.

"Please refer to the above statement of facts and advise me as follows:

"1. Is such a claim for mileage a legal claim against the County or would same be a part of his duties in relation to public roads for which he receives not exceeding $400.00 annually as per Section 7285, Code of 1923?"

In reply to your inquiry, I call your attention to that part of Section 7285, Code of Alabama, 1923, which is as follows:

"Section 7285 — Fees allowed to judges of probate — Judges of Probate are entitled to the following fees for the following services:

"Discharging his duties in relation to public roads, on proof to the County Commissioners that he has discharged such duties, annually, to be paid out of the county treasury, not exceeding ..... $400.00. But this shall not apply to any probate judge who receives net annual compensation from his office exceeding five thousand dollars * * * * *".

The duties performed by a probate judge in relation to public roads are recognized as "ex-officio services." **Macon County v. Abercrombie, Judge,** 184 Ala. 283, 63 So. 985. For these ex-officio services, where net annual compensation of the Probate Judge is less than $5,000, the statute sets a maximum compensation of $400.00 per annum. All duties discharged by the probate judge in relation to public roads may be compensated for out of the county treasury, but the total annual allowance for such services cannot exceed $400.00. **Biennial Report of Attorney General 1920-22, page 23, Biennial Report of Attorney General 1918-20, page 680 and Opinion of Attorney General to Hon. A. H. Glasgow, Judge of Probate of February 20, 1936, found in Quarterly Report Attorney General, Vol. II, page 182.**

It has been held by our Supreme Court as follows:

> "An officer demanding fees for services rendered must point to some clear and definite provision of the statute which authorizes the demand, and compensation cannot be allowed, unless it is conferred by a strict construction of the language employed in the statute. Statutes giving costs or fees will not be extended beyond their letter." Hermann v. Mobile County, 202 Ala. 274, 80 So. 112; Troup v. Morgan County, 109 Ala. 162, 19 So. 503.

Premises considered, for the performance of any and all duties in relation to public roads, the county may make an annual allowance to the probate judge not exceeding four hundred dollars. If the probate judge is already receiving this amount, the county cannot legally pay him an additional amount to cover mileage on trips to Montgomery to attend to matters in relation to public roads.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 15, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Charter Fee — In levying charter fee under Section 6969, Code of Alabama, 1923, the Judge of Probate must charge $1.00 for every $1000.00 or fraction thereof of the proposed capital stock.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your request for official opinion under date of February 16, 1939, which is as follows:

> "Please give me your opinion on Section 6969 of the 1923 Code.

"If a corporation is incorporated for $7,500, would the Charter Fee be $7.50 or $8? In other words can a Probate Judge accept less than $1.00 on a fraction of $1,000 capital stock?"

It is my conclusion that a Judge of Probate must charge $1.00 for every $1000.00 or fraction thereof of the proposed capital stock and, accordingly, the charter fee to be collected on the corporation in question should be $8.00.

Section 6969 of the Code of Alabama of 1923, to which you refer, is as follows:

"6969. Charter fees, amounts and how paid. — At the time the certificate is filed in the office of the judge of probate the incorporators shall pay to the probate judge for the use of the state, **one dollar for every one thousand dollars of the proposed capital stock, but in no case less than five dollars.**" (Emphasis supplied).

It will be noted that the unit of measure of the proposed capital stock is based on each $1,000. Therefore, it is my opinion that it was the intention of the Legislature that the charter fee should be charged for each $1000 or fraction thereof. This legislative intent is substantiated by the fact that said Section 6969 specifically provides that the charter fee shall be $5.00 from $1000 to $5000 and it naturally follows that the fee for an amount in excess of $5000 shall be based on units of $1000. To rule otherwise would be contrary to the meaning or spirit of the statute.

"That construction of statutes is correct that gives to each the effect which the statute maker intended. The intention of the lawmaker is the law." City of Birmingham vs. Southern Express Company 164 Ala. 529, 51 So. 159.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 15, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Probate Judge : A claim filed for mileage by a Probate Judge for ex officio services rendered in connection with public roads is not a legal claim against a county where the Probate Judge is already receiving the maximum of $400.00 allowed him for his ex officio duties in relation to public roads.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated March 6, 1939, which is as follows:

"A Judge of Probate has filed and been paid claims for mileage on trips to Montgomery for conference with the State Highway Department and for other trips to various places securing right of way deeds and attending to other matters in relation to public roads.

"Please refer to the above statement of facts and advise me as follows:

"1. Is such a claim for mileage a legal claim against the County or would same be a part of his duties in relation to public roads for which he receives not exceeding $400.00 annually as per Section 7285, Code of 1923?"

In reply to your inquiry, I call your attention to that part of Section 7285, Code of Alabama, 1923, which is as follows:

"Section 7285.—Fees allowed to judges of probate.—Judges of Probate are entitled to the following fees for the following services:

"Discharging his duties in relation to public roads, on proof to the County Commissioners that he has discharged such duties, annually, to be paid out of the county treasury, not exceeding. . . .. $400.00. But this shall not apply to any probate judge who receives net annual compensation from his office exceeding five thousand dollars ****".

The duties performed by a probate judge in relation to public roads are recognized as "ex-officio services." **Macon County v. Abercrombie, Judge,** 184 Ala. 283, 63 So. 985. For these ex-officio services, where net annual compensation of the Probate Judge is less than $5,000, the statute sets a maximum compensation of $400.00 per annum. All duties discharged by the probate judge in relation to public roads may be compensated for out of the county treasury, but the total annual allowance for such services cannot exceed $400.00. **Biennial Report of Attorney General 1920-22, page 23, Biennial Report of Attorney General 1918-20, page 680 and Opinion of Attorney General to Hon. A. H. Glasgow, Judge of Probate of February 20, 1936, found in Quarterly Report Attorney General, Vol. II, page 182.**

It has been held by our Supreme Court as follows:

"An officer demanding fees for services rendered must point to some clear and definite provision of the statute which authorizes the demand, and compensation cannot be allowed, unless it is conferred by a strict construction of the language employed in the statute. Statutes giving costs or fees will not be extended beyond their letter." Hermann v. Mobile County, 202 Ala. 274, 80 So. 112; Troup v. Morgan County, 109 Ala. 162, 19 So. 503.

Premises considered, for the performance of any and all duties in relation to public roads, the county may make an annual allowance to the probate judge not exceeding four hundred dollars. If the probate judge is already receiving this amount, the county cannot legally pay him an additional amount to cover mileage on trips to Montgomery to attend to matters in relation to public roads.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 15, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Costs—

1. Sheriff and clerk not entitled to fees for services rendered subsequent to judgment and sentence of court.

2. When defendant convicted and sentenced to pay a fine and costs, he can either pay the fine and costs, or the court may allow him to confess judgment, with good and sufficient sureties for fine and costs. Upon failure to pay fine and costs, defendant should either be imprisoned in the county jail, or at discretion of the court, sentenced to hard labor for the County.

3. Where there is a judgment for costs, the Examiner of Accounts has no duty in examining the court.

4. Where there is a judgment for costs and an execution is returned "No property found," the costs become a charge against the fine and forfeiture fund.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request of February 2, 1939, as follows:

"Please refer to the following:

" 'Circuit Court of ..... County.

State of Alabama
vs. Set for 6-13-34
..... Offense: Embezzlement.

Indictment 4-13-34 Out on Bond.

Orders of Court:

June 13, 1934	Reset for June 29, 1934, at request of Defendant.
June 29, 1934	On motion of State Solicitor and with consent of Defendant indictment amended by adding Count, charging receiving money under false pretense.
June 29, 1934	Defendant waives arraignment and pleads guilty with consent of State to receiving money under false pretense.
June 29, 1934	Adjudged guilty of receiving money under false pretense sentenced to pay a fine of $51.00 and Costs of Court in default of payment of fine sentenced to hard labor for County for thirty days and on recommendation of State Solicitor sentence suspended to July 31, 1934.

July 31, 1934	Reset for October 5, 1934.
October 5, 1934	Reset for November 26, 1934.
Nov. 26, 1934	Reset for December 21, 1934.
Dec. 21, 1934	Reset for January 9, 1935.
January 9, 1935	'Forfeiture Ni-Si and Alias Writ (Alias Writ issued 1/9/35). (1-26-35 Defendant arrested on Forfeiture issued January 9, 1935. Service had on Sureties.)
January 26, 1935	Forfeiture Ni-Si set aside consent of State Solicitor and sentence suspended to January 28, 1935 by consent of State Solicitor and Defendant parcled to Mr. ..... until Monday at 9:30 A. M.
January 28, 1935	Reset for July 31, 1935.
January 31, 1935	Passed for term.
July 31, 1935	Upon motion of State, indictment ordered withdrawn and filed with leave to reinstate.'

and advice me as follows:

"1. From the above orders of the Court, was this case disposed of on June 29, 1934 when Defendant was sentenced to hard labor in default of fine and costs and such sentence suspended or does the order of July 31, 1935, prevail?

"2. If the order of June 29, 1934 prevails, would the Clerk and Sheriff be entitled to fees for services performed, such as continuance, issued and serve subpoenas, issue and execution of Writ of Arrest, etc., since such date?

"3. Is it mandatory that, on default of payment of fine and costs, the Defendant be sentenced to a sufficient number of days to fully satisfy the payment of such fine and costs by labor as prescribed by law?

"4. If your answer to question No. 3 is in the affirmative what is the duty of an Examiner of Accounts, examining such Court, when the Court has failed to pass sentence, as provided by law, to enforce payment of fine and costs by labor?

"5. When the Court has failed to pass sentence to enforce payment of fine and costs by labor, as provided by law, does execution properly issue for fine and costs and upon return of same 'No Property Found', would the fees of the Clerk, Sheriff and Witnesses be a legal claim against the Fine and Forfeiture Fund?"

Subsequent to the receipt of your request you furnished this office with a copy of the judgment entry, which is as follows:

"State of Alabama Thornton vs. 16973, Charles A. Hogan.	Embezzlement—plea guilty to receiving money under false pretenses—fined $51.00 and costs in default of payment of fine sentenced to hard labor for county for 30 days—sentence suspended to July 31st, 1934.

"This day in open court came the State of Alabama by its Solicitor and the defendant in his own proper person and with his attorney and upon motion of the State Solicitor and with the consent of the defendant,; It is ordered and adjudged by the court that the State Solicitor be and is hereby allowed to amend the indictment in this case by adding a count charging receiving money under false pretenses.

"Thereupon in open court on this day defendant waived arraignment on the amended indictment in this case charging him with the offense of embezzlement and receiving money under false pretenses and with the consent of the State Solicitor plead guilty to receiving money under false pretenses.

"Thereupon in open court on this day the defendant being asked by the court if he had anything to say why the judgment and sentence of the law should not be passed upon him replied 'he had not'; It is therefore considered and adjudged by the court that the defendant is guilty of the offense of receiving money under false pretenses as charged in the amended indictment and that the State of Alabama for the use of Mobile County have and recover of the defendant a fine of fifty one dollars and the costs of this prosecution.

"And defendant having made default in the payment of the said fine and costs; It is considered and adjudged by the court that the defendant perform hard labor for the County of Mobile, Alabama, for the term of thirty days in lieu of said fine.

"And upon motion of the defendant; It is further ordered and adjudged by the court that execution of the sentence in this case be and the same is hereby suspended until July 31st, 1934."

In reply to your letter, I wish to advise that an answer to your first inquiry is unnecessary in view of the answers to your other questions.

I answer your second inquiry in the negative. The clerk and sheriff would not be entitled to fees for services performed subsequent to judgment and sentence of the court on, to wit, June 29, 1934.

I answer your third inquiry by referring you to Section 5288, Code of Alabama, 1923, which is as follows:

"5288. Confession of judgment by defendant for fine and costs.—When a fine is assessed, the court may allow the defendant to confess judgment, with good and sufficient sureties, for the fine and costs."

And to that part of Section 5290, Code of Alabama, 1923, which is as follows:

"5290. On default in payment of fine and costs, imprisonment or hard labor imposed.—If the fine and costs are not paid, or a judgment confessed according to the provisions of the preceding section, the defendant must either be imprisoned in the county jail, or, at the discretion of the court, sentenced to hard labor for the county as follows:

In reply to your fourth inquiry, I wish to advise that there was a judgment for costs in this case as shown by information furnished this office subsequent to the receipt of the original request.

I answer your fifth inquiry in the affirmative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 15, 1939.

Hon. J. A. Carnley,
Judge of Probate,
Coffee County,
Elba, Alabama.

1. County authorized to appropriate sum for furnishing school books and clothing to school children from sales tax receipts only if proper authorities of Alabama or Federal Welfare authorities hold the same to be within the meaning of the term "public welfare" as that term is used in Section 21 of the Sales Tax Act.

2. County governing body authorized to appropriate sum for purpose of furnishing school books and suitable clothing to school children from General Fund, enhanced by ten per cent of the net proceeds of the State Liquor Stores (Alabama Beverage Control Act, General Acts, 1936-37, page 40, Section 9 (c)), provided there is a surplus in said fund after all involuntary obligations against the same have been paid.

3. County governing body authorized to appropriate sum for furnishing school books and suitable clothing for school children from fund divided equally among each of said counties by Section 9 (c) of the Alabama Beverage Control Act to be used for "purposes of the County Departments of Public Welfare" etc. only if such expenditure comes within the meaning of the term as used in said section.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Request has been made by the Attendance Supervisor and County Superintendent of Education of Coffee County, to the Commissioners Court of Coffee County, Alabama, that the Court appropriate or set apart out of the county fund derived from the Sales Tax or from the Alabama Beverage Control Act Revenue, the sum of $25.00 per month as an emergency fund to be expended by way of furnishing school books and suitable clothing to school children whose parents are not permanently eligible for assistance. The Commissioners Court has been informed that such an emergency fund if appropriated or set apart, would be distributed through the local Department of Public Welfare. If such an appropriation, or setting aside of such fund, would be permitted under the law, then the Commissioners Court would probably take favorable action on the request therefor. In view of the above I respectfully request your opinion as follows:

"1. Does the Commissioners Court of Coffee County, Alabama, have the authority to appropriate or set aside to the local office of Public Welfare Department from the county's sales tax or Alabama Beverage Control Act Revenues a monthly amount to be designated as an emergency fund to be used exclusively in equipping school children with books and suitable clothing, though the children themselves not their parents are eligible for permanent assistance through the Welfare Department.

"The matter of this appropriation, if it can be legally made, is urgent in this county and I would thank you for an early opinion on the question."

Replying first to your inquiry as to whether or not the Commissioners' Court may set aside to the local office of the Public Welfare Department from the Sales Tax fund a monthly amount to be designated as an emergency fund to be used for equipping school children with books and clothing, you are advised that this may be paid if, and only if, it is held by the proper authorities of the Alabama Department of Public Welfare or the Federal Social Security Board that this expenditure comes within the term "public welfare" as that term is used in Section 21 of the Sales Tax Act. This section provides, in pertinent part, as follows: (General Acts, 1936-37, page 125)

"Provided that the funds divided and distributed to the several counties of the state as hereinabove provided for shall be used exclusively for full-time health service in cooperation with the State Board of Health and/or the Federal Government; for Public Welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension services in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the Commissioners Court, Board of Revenue, or other governing bodies of the several counties of the State."

In construing this provision of the Sales Tax Act, the Supreme Court of Alabama in the recently decided case of **Tuscaloosa County v. Chester Walker, Judge of Probate,** 235 Ala. 293, 178 So. 543, held that it was the legislative intent that the state agencies mentioned therein, and not the various county governing bodies, were to exercise their judgment as to whether or not the expenditures by the various counties from the Sales Tax Fund were within the meaning of the terms "public health," "public welfare," and "agricultural extension services."

The conclusion must, therefore, be reached that the expenditure from the Sales Tax Act cannot be made unless and until the same is held by the proper authorities to be within the meaning of the term "public welfare" as that term is used in Section 21. Cf. Opinion to Hon. Chas. W. Lee, under date of March 9, 1938 (Quarterly Report of Attorney General, Vol. IX, page 132).

With regard to your right to make expenditures for this purpose from the proceeds of the Alabama Beverage Control Act (General Acts 1936-37, page 40), I wish to call your attention to Section 9(c), the pertinent part of which is as follows:

> "Ten percent shall be covered into the Treasury of the State to the credit of the sixty-seven Counties of the State and shall be divided equally among each of said counties, and shall be paid to them and shall be covered by them into their respective general funds; ten percent shall be paid into the Treasury of the State to the credit of the sixty-seven counties of the State, and shall be divided equally among each of said counties and shall be paid to them to be used by them exclusively for the purposes of Public Health, Old Age Pensions, and for the other purposes of the County Departments of Public Welfare."

You will note from this section that ten per cent of the funds derived from the proceeds of the State Liquor Stores under the provisions of the Act are paid into the Treasury of the State to the credit of the General Fund of the sixty-seven counties. These funds may, of course, be expended by the county for any lawful purpose after the preferred claims set forth in Section 231 of the Code of Alabama, 1923, as amended, and all other involuntary obligations against said fund have first been paid, provided there exists a surplus in the General Fund sufficient to permit the desired appropriation.

If, therefore, a surplus exists in the General Fund after the payment of all involuntary obligations, the county governing body may legally make the appropriation concerning which you inquire. Cf. Opinion to Hon. Chas. W. Lee, State Comptroller, dated August 27, 1937 (Quarterly Report of Attorney General, Vol. VIII, p. 202).

You will also note that an additional ten per cent is paid into the treasury of the State to the credit of the sixty-seven counties to be used by the counties for the purposes of Public Health, Old Age Pensions and for "the other purposes of the County Departments of Public Welfare." If the equipping of school children with books and suitable clothing comes within the "purposes of the County Department of Public Welfare," then you would be justified in appropriating the sum of $25.00 from these funds derived from the Alabama Beverage Control Act. This, of course, would depend upon whether or not the County Department of Public Welfare advised the county in advance as to its program in connection with the furnishing of school books and clothing, if such program had in fact been adopted and if such, in fact, was a part of its program.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 16, 1939.

Hon. H. M. Hughes,
Clerk, Circuit Court,
Madison County,
Huntsville, Alabama.

Witness fees—Civil Cases.

Per diem fees cannot be paid in more than one case for the same day.

Opinion by Assistant Attorney General Mitchell.

Dear Sir:

I have your letter of February 24, 1939, in which you request my opinion as follows:

"In re: Civil Docket—

"In reference to case No. 2360, Geo. C. Johnson vs. Frank Clift et al and case No. 2361, Alice J. Stanford vs. Frank Clift et al.

"Practically the same witnesses were summoned in both cases. When the cases were called—on the same date—the witnesses were here; and, by agreement of the plaintiff's and the defendant's attorneys, a judgment was rendered in each case.

"I issued to the witnesses Certificates for mileage and per diem in one of the cases and, per diem in the other.

"I am asking you for an opinion as to whether or not I should have allowed the witnesses to claim per diem in both cases.

"I will appreciate and thank you for an opinion, at the earliest possible moment."

Replying thereto I am of the opinion that a witness appearing in more than one case on the same day should not be allowed per diem fees in but one case.

Section 7236, Code of 1923, reads:

"A witness shall charge for his mileage and attendance but on one side of the same cause, and a witness attending in more cases than one at the same time shall only be entitled to a fee in one case, to be selected by him while so attending; but if, after the case in which he elects to claim his fees is disposed of, his attendance is required in the other case, or cases, he shall for such attendance be entitled to claim his per diem in such other case, or if more than one, in the one which he may elect to claim his fees; and so on until all the cases in which

he is required to attend are disposed of by trial, continuance, or otherwise; **but no witness shall receive his per diem in more than one case for the same day.**" (Emphasis ours)

This provision seems never to have been interpreted either by the courts or by this office except in the case of Renfro v. Kelly, 10 Ala. 357, in which the court held that a witness appearing for both plaintiff and defendant could not claim compensation from both parties.

The wording of this Code section clearly forbids, in my opinion, the allowance of more than one per diem fee to a witness for the same day.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 16, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Members of Legislature—Mileage and per diem and expenses—

Where State Legislature recessed from Thursday, March 9th to Tuesday, March 14th, for purpose of permitting engrossing and enrolling committees to complete necessary work, members of Legislature held entitled to per diem and expenses but not mileage.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 14, 1939, in which you request my opinion as follows:

"The State Legislature recessed from Thursday, March 9th, to Tuesday, March 14th. The Secretary of the Senate and the Clerk of the House have issued vouchers and sent same to this office whereon they are allowing the members of the Legislature $4.00 per diem for the four days from Thursday, the 9th, to Tuesday, the 14th, (Friday-Saturday-Sunday-Monday) and mileage at the rate of ten cents ($.10) per mile in going from and returning to the seat of government. These vouchers were duly authorized by the respective presiding officers of the Senate and House of Representatives. This office has paid during the present session of the Legislature, and before the submission of the present claims in question, mileage to all Members at the rate of ten cents ($.10) per mile, from their several counties to Montgomery and return.

"Please advise on the following question:

"1. Are the Members of the present Legislature entitled to receive $4.00 per day for the days of March 10th, 11th, 12th, and 13th?

"2. Are the Members of the present Legislature entitled to receive mileage **from Montgomery to their respective home counties and return to the seat of government** during the recess that was taken from March 9th, to March 14th?

"3. Are the Members of the present Legislature entitled to receive pay for official expenses classed under the provisions of House Bill 322, page 176, General Acts of 1935 for the days of March 10th, 11th and 13th?"

In reply to your inquiries, you are advised that members of the Legislature are entitled to receive the $4.00 per day for the days, March 10, 11th, 12th and 13th, and pay for official expenses classed under the provisions of House Bill 322, General Acts, 1935, page 176, for the days March 10th, 11th and 13th but they are not entitled to receive mileage from Montgomery to their respective home counties and return to the seat of government during the recess taken from March 9th to March 14th.

It appears that the purpose of the recess was to permit the committees on engrossed and enrolled bills to complete their work and come abreast of the legislative activities. The Supreme Court of Alabama has specifically held in **Moren v. Blue,** 47 Ala. 709, that where the Legislature adjourns for some special reason or purpose, both the members and the officers of the two Houses are entitled to their per diem compensation.

In Ex Parte Pickett, 24 Ala. 91, 95, the Supreme Court speaking to this question said:

"A member may be engaged in attendance on the General Assembly, during periods of temporary cessations of legislative functions by the respective bodies; and the **per diem** compensation was intended as a remuneration for the services of the members, as well as to provide for their expenses during the period they were required to be absent from their homes in attending to the duties of legislation, as those duties are usually and ordinarily performed. And the object in limiting this compensation to each day's attendance, was, to secure on the part of the member, who are not within the exemptions provided for by Section 44, the performance of legislative duty during those days which the house to which he belonged deemed necessary to devote to the business of legislation. It was never intended that the members of the Legislature should not receive pay for Sundays, or pending temporary adjournments upon holidays, or on occasions of the death of a member. The practical construction of the law, from the organization of the government to the present time, has been otherwise, and we have no disposition to depart from it. These are not regarded as permanent cessations in the business of legislation, but in the nature of adjournments from day to day, when, in legal contemplation, the business is progressing. **Indeed, it may often happen, that a temporary adjournment for a few days may tend to facilitate the business, since the committees may thus be afforded time to consider of and mature the matter of bills and resolutions referred to them."**

The foregoing quotation from the Pickett case is set out at length and approved by the Supreme Court of Wisconsin in **State Ex Rel Boyd v. Hastings,** 50 Wis. 337, where that court held that where there is a temporary cessation of legislative functions by the legislative bodies caused by a temporary adjournment to facilitate business and to enable committees to consider and mature bills and resolutions etc., the members are entitled to their per diem compensation.

In **State Ex Rel McMurty v. Thompson,** Auditor, 37 Mo. 176, the court speaking to the question says:

> "Cushing says that Sundays and other days mentioned, being legislative days, or not, according to the determination of the assembly, they are always reckoned as a part or so many days of the session, and the members draw their daily pay for these as much as for any other days (Cushing Law. Prac. of Legis. Assem., Section 357). Therefore, when the Legislature is actually in session, an adjournment for the time or purposes above specified will not be sufficient to interrupt the session, and the members will be entitled to pay."

The foregoing principles also apply to the right of the members of the Legislature to receive pay for official expenses classed under the provisions of House Bill No. 322, General Acts, 1935, page 176. Of course, the members would only be entitled to pay under this Act for the days of March 10th, 11th and 13th inasmuch as by Section 3 of said Act Sundays are specifically excepted.

We come next to consider the question of mileage. Section 1521 of the Code of Alabama, 1923, following Section 49 of the Constitution of 1901, provides as pertinent that:

> " * * * The president of the Senate and the speaker of the House of Representatives and each member of the Legislature shall be allowed ten cents for every mile's travel in going to and returning from the seat of government. * * *"

Considering the foregoing provision, which appeared as Section 49 in the Code of Alabama of 1867, the Supreme Court of Alabama in **Ex Parte Matthews,** 52 Ala. 51 stated:

> "The law above quoted (Section 49 of the Code of 1867), in regard to mileage seems to contemplate allowance of it for going and returning once only, during each entire session."

It is true that the court in the Matthews case, supra, cites with approval the holding in the case of Ex Parte Pickett, 24 Ala. 91, supra, where it was held that a member of the General Assembly of 1853, which adjourned over on the 20th of December of that year to the 9th of January, 1854, who went home and returning during the recess, was entitled to mileage for this traveling from and to the capitol. But the obvious distinction between the ruling of the court in the Pickett case and the situation set forth in your inquiry is that the court in the Pickett case, before ruling that the members of the Legislature were entitled to mileage, determined that the General Assembly had adjourned **"not to facilitate the business of the session but to obtain a cessation of it for a given period that the members might return to their respective homes."**

The obvious conclusion which must be drawn is that if the reason for the adjournment of the Legislature is to afford an interim to facilitate the business of the session during which time the members are in attendance upon the legislative body, then in such event the members would be entitled to per diem and expenses. However, where the legislative body adjourns for such purpose it cannot be said that in traveling to and from the Legislature during such recess the members are "going to and returning from the seat of government" within the meaning of Section 49 of the Constitution of 1901 and Section 1521 of the Code of Alabama, 1923, supra, so as to be entitled to mileage.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 16, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Members of Legislature—

1. Section 1524 of the Code of Alabama, 1923, held uncontsitutional as violative of Section 49 of the Constitution.

2. Members of the Legislature are entitled to receive mileage at the rate prescribed by Section 49 of the Constitution and Section 1521 of the Code of Alabama, 1923, for the distances prescribed in said Section 1521 for each session of the Legislature, regardless of the length of time between a regular and called or extraordinary session, or between a called or extraordinary session and a regular session, when the claims have been properly certified to and approved by the presiding officers of the respective houses of the Legislature in accordance with the provisions of Section 1525 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 15, 1939, which follows:

"Section 1524 of the 1923 Code of Alabama reads as follows:

" 'When the interval between a Regular and Called Session, or between a Called and Regular Session, is not more than four days, no mileage shall be allowed.'

"Please advise me in answer to the following:

"1. Does the above recited Section 1524 of the 1923 Code of Alabama conflict with Section 49 of the 1901 Constitution?

"2. If you hold that Section 1524 of the 1923 Code is Unconstitutional, would the Members of the present Legislature be entitled to receive mileage at the rate of ten (.10) cents per mile from their respective home Counties to the Seat of Government during any interval regardless of its length between a Regular and Called Session, or between a Called and Regular Session, where the claims have been properly certified to and approvd by the proper presiding officers of the two respective Houses of the State Legislature?"

I am of the opinion that both of your inquiries should be answered in the affirmative.

Section 49 of the Constitution of 1901 reads as follows:

"The pay of the members of the legislature shall be four dollars per day, and ten cents per mile in going to and returning from the seat of government, to be computed by the nearest usual route traveled."

Section 1524 of the Code of Alabama, 1923, reads as follows:

"Mileage when intervals between sessions are not more than four days.—When the interval between a regular and called session, or between a called and regular session, is not more than four days, no mileage shall be allowed."

Beginning with the Constitution of Alabama of 1819 (Article III, Section 24), the constitutional provision for the pay of members of the Legislature was as follows:

"Each member of the General Assembly shall receive from the public treasury such compensation for his services as may be fixed by law; but no increase of compensation shall take effect during the session at which such increase shall have been made."

This constitutional proviso which left the pay or compensation of members of the General Assembly to be fixed by the General Assembly itself was carried forward substantially, if not literally, in each succeeding Constitution of this State until the Constitution of 1875. See Article III, Section 24 of the Constitution of 1861; Article IV, Section 22 of the Constitution of 1865; and Article IV, Section 18 of the Constitution of 1868.

With the fundamental law as above stated, the Legislature of 1861 passed an act, which it then, no doubt, had the constitutional power and authority to do, providing as follows:

"That it shall not be lawful for any member of either the House of Representatives or Senate to charge or receive mileage for any travel between the adjournment of this extra session and the assembling of the two houses in regular session on the 11th day of November, 1861. Nor shall any mileage be charged or received between the adjournment of any called or regular session and the assembling of any regular or called

session, when the interval between the two sessions shall not be more than four days." Act No. 49, General Acts, 1861, Special Session, p. 50, approved November 6, 1861.

The substance of this last sentence of this Act first appeared in an Alabama Code as Section 51 of the Revised Code of 1867, in the same language as it now appears as Section 1524 of the Code, supra, and it has appeared in that form in each intervening Code.

During the time that the contitutional provisions in regard to the pay or compensation of members of the Legislature were as above set forth, the compensation of the members was fixed by statute. In 1874, this statute appeared as Section 49 of the Revised Code of 1867, in pertinent part as follows:

"Each member of the General Assembly shall receive six dollars for each day's attendance * * * and be allowed eight dollars for every twenty miles traveled in going to and returning from the seat of government * * *."

This section was construed by the Supreme Court in the case of **Ex Parte Matthews**, 52 Ala. 51, in the following language:

"The law above quoted, in regard to mileage, seems to contemplate allowance of it for going and returning * * * during each * * * session."

With this judicial construction having been placed upon that statutory provision, it was incorporated in the Constitution of 1875 as Article IV, Section 6 in substantially the same language and was reincorporated in the Constitution of 1901 as Section 49, supra.

Consequently, it must be held that Section 49 means that the members of the Legislature are entitled to mileage at the rate prescribed therein "in going to and returning from the seat of government, to be computed by the nearest usual route traveled" for each session of the Legislature. "The language of an existing statute adopted into a Constitution is presumed to be taken with its established construction." 12 C. J. 717, Section 69. See also **State v. Birmingham Southern R. R. Co.**, 182 Ala. 475.

Therefore, since Section 49 of the Constitution means that members of the Legislature are entitled to mileage at the rate therein prescribed "in going to and returning from the seat of government, to be computed by the nearest usual route traveled" for each session of the Legislature, Section 1524 of the Code, supra, which, in effect, provides that from the seat of government, to be computed by the nearest usual route traveled" for certain sessions of the Legislature only (such sessions as are separated by more than four days), must fall as an unauthorized attempt by the Legislature to alter, amend or limit the self-executing provisions of Section 49, supra.

While it is true that statutes should never be declared to be in conflict with the Constitution unless the court is convinced beyond a reasonable doubt that there is such conflict, yet the Legislature cannot amend or alter provisions of the Constitution which are self-executing and when it attempts to do so, the statutes making the attempt must be stricken down.

In the case of **Ex Parte Western Union Telegraph Co.,** 200 Ala. 496, we find a peculiarly apt statement of this principle. The court in that case had under consideration the question of whether or not Section 6112 of the Code of Alabama, 1907, was violative of Section 232 of the Constitution, which provided that a foreign corporation "may be sued in any county where it does business." Speaking through Mr. Justice Mayfield, the court said:

> "The Constitution having thus in terms required foreign corporations to do certain things, in order to acquire the right to do business in the state, and thus in terms subjected them to liability to be sued in any county in which they are then doing business, and thus conferred on citizens the right to sue them in such counties, it is not competent for the Legislature to relieve the corporations of this burden, or to deprive the citizens of the right so conferred. **The Legislature may provide statutes to give force, effect, and application to the provisions of the Constitution, but it cannot, as this court has repeatedly reaffirmed, bend or alter such provisions as are self-executing.** Suppose a foreign corporation to be doing business in every county in the state: the effect of the self-executing provision of the Constitution is to authorize suit against such corporation in any county in the state. **For the Legislature to say that if the action is for a personal injury the suit can be brought, not in any one of the 67 counties, but in only 1 of 2—that is, where the injury occurred, or where the plaintiff resides—would be, if not to place restrictions upon the self-executing provision, to apply the pruning knife too freely, to cut off 65 scions of his constitutional tree."** (Emphasis ours)

To like effect is the decision of the Supreme Court in the case of **Board of Revenue of Jefferson County v. State Ex Rel City of Birmingham,** 172 Ala. 138, where the court, speaking through Mr. Justice McClellan, struck down a statute as violative of Section 215 of the Constitution of 1901 as an unauthorized attempt to change the provisions of said Section 215, and said:

> "Constitutional mandates and restrictions cannot be altered, contracted or expanded by that means."

We are not unmindful of the fact that this said Code Section 1524 has been embodied in our statutory law since 1861, and that its constitutionality has not heretofore been called into question. No doubt, the reason for its constitutionality having never before been called into question is that no situation has ever before arisen, since the section which now appears as Section 49 of the Constitution was placed in our organic law in 1875, to which this statutory provision was applicable. However, " 'old age cannot give validity to a void statute, nor will acquiescence for any length of time, nor any amount of practical construction, prevent a court from declaring void a statute which clearly contravenes the Constitution.' 12 C. J. 798, 799; Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302." **Parke v. Bradley,** 204 Ala. 455.

Pursuant to the provisions of Section 49 of the Constitution, supra, and the provisions of Section 1521 of the Code of Alabama, 1923, the members of the Legislature are entitled to receive mileage at the rate of ten cents per mile for the number of miles prescribed in said Section 1521 for each session of the Legislature, regardless of the length of time between a regular and called or extraordinary session, or between a called or extraordinary session and a regular session, when the claims have been properly certified to and approved by the presiding officers of the respective houses of the Legislature in accordance with the provisions of Section 1525 of the Code of Alabama, 1923, which latter section provides:

"The compensation due to the officers and members of the Legislature must be certified by the president and speaker, respectively, to the State Auditor (now Comptroller) who must issue his warrant therefor on the State Treasurer."

It might be remarked on passing that the interval which intervened between the date of the recess of the regular session or the present Legislature on March 14th and the date of the convening of the extraordinary session of the present Legislature today was not an interval "between a regular and called session, or between a called and regular session," but is rather an interval between a recess of a regular session and a called or extraordinary session, which was called by the Governor as the Justices of the Supreme Court held he had the authority to do in **In Re Opinions of the Justices,** 222 Ala. 353.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 17, 1939.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Filing Tax — Deed given by mortgagor to mortgagee is subject to filing tax on value of property conveyed in excess of mortgage, provided the original mortgage is filed and lawful filing tax was paid thereon.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge receipt of your inquiry, which is as follows:

"I am writing you this letter for an official opinion.

"A deed was filed in this office for record today. The history of the transaction is as follows:

"A sold B a parcel of real estate for $16,000; paying part of the purchase price and giving a mortgage for $12,000. These papers were filed and the proper taxes paid.

"B, the mortgagor, is now by the deed filed today, conveying back to the mortgagee the original owner, A, the parcel for and in consideration of the mortgagee's credit of $12,000 on the mortgage which shows a $12,000 indebtedness.

"The grantee, A, contends that this deed is not a deed in lieu of foreclosure for the reason that there is no actual or recited cancellation of the mortgage and also for the reason that there are judgment creditors whose rights are in no wise altered by this transaction. His contention that this is a deed subject to a $12,000 mortgage, even though it be his own mortgage, and is, therefore, not subject to State Deed Tax, seems to me to be unsound.

"My contention is that the mortgagee in crediting the mortgage for $12,000 is giving to the mortgagor a consideration of $12,000 even though no money actually passes and that the deed is, therefore, subject to tax for the full value of the property and at least upon $12,000.

"Please advise me if this contention is sound."

It is my opinion that a deed filing tax on the value of the property conveyed in excess of the mortgage should be collected on the instrument offered for record.

The rule as laid down in **Dennis v. McEntire Mercantile Co.,** 187 Ala. 314, 65 So. 774, is that a deed given in lieu of formal foreclosure operates as a satisfaction and extinguishment of the debt secured by the mortgage; but its effect upon the mortgagee's interest in the land was not to destroy the legal title vested in him by the mortgage and mortgagor's default, nor to create a new and independent title by way of substitution, but simply to vest in the mortgagee the mortgagor's equity of redemption and strip the latter of all his remaining interest in the land, thus uniting in the mortgagee the titles of mortgagor and mortgagee as in a stranger purchasing at a foreclosure sale.

Schedule 46 of Section 348, General Acts of Alabama, 1935 is in part as follows:

"No deed, which conveys any real or personal property within this State * * * shall be received for record unless the following privilege or license tax shall have been paid * * * . **Provided that only the value in excess of any mortgages * * * upon any property within this State on which the mortgage tax has been paid,** shall be taxable under this schedule * * * ." (Emphasis supplied).

Pursuant to the above, this office has held that the filing tax is based upon the value of the interest conveyed at the date of the execution of the deed. **Biennial Report of Attorney General, 1928-1930, page 210; Quarterly Report of Attorney General, Volume I, page 56.** Therefore, it is my conclusion that a deed filing tax should be paid by the grantee in question on the value he receives in excess of his mortgage. Accordingly, if the value of the interest conveyed does not exceed the amount of the mortgage, it is my opinion that the mortgagee is not liable for a deed tax.

The conclusion reached in this opinion is in conflict with an opinion addressed to Hon. Wm. W. Brandon, Judge of Probate, Tuscaloosa County, Tuscaloosa, Alabama, February 3, 1933, appearing in Biennial Report of Attorney General, 1932-34, p. 149, which is hereby overruled and withdrawn.

In an opinion addressed to Hon. A. M. McConnell, Judge of Probate, Limestone County, Athens, Alabama, September 27, 1937, appearing in Quarterly Report of Attorney General, Vol. VIII, p. 309, the writer stated in the last two paragraphs as follows:

> "* * * If the instrument offered for record failed to contain any recitation that it is given in lieu of mortgage foreclosure with full right of redemption reserved for the statutory period, then in my judgment you would be required under the law to rule that the deed or instrument is subject to the filing tax, for the reason that the transaction amounts to a sale of the land or property conveyed as distinguished from a mere surrender of the equity of redemption, as would be the case in the latter instance if the instrument were a mere deed given in lieu of mortgage foreclosure.
>
> "It would be your duty as Probate Judge to ascertain the facts and determine whether or not the transaction amounts to a sale of the land to the owner of the mortgage, or whether it is nothing more than a surrender of the mortgagor's equitable right of redemption which could have been compelled by lawful mortgage foreclosure sale. * * *"

Said statements are in conflict with this opinion, and so far as that portion of said opinion is confirmed it is hereby overruled.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 20, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Judgments — In criminal cases there must be a judgment of guilt.

Costs — Where there is no judgment of guilt, costs are claim against Fine and Forfeiture Fund.

Opinion by Assistant Attorney General Mitchell.

Dear Sir:

I have your letter of February 1, 1939, in which you request my opinion as follows:

> "'Order of Court: It is ordered by the Court that this case be dismissed on the payment by Defendant of $125.00, which said $125.00, when collected by the Clerk shall be paid into the County Treasury of _____ County.'

"Please refer to the above order and advise me as follows:

"1. Should a sufficient sum of the amount paid to the Clerk be used to pay the Costs in such Case?

"2. If the Costs are not payable out of the amount paid to the Clerk, would the fees of Officers and Witnesses in such case be a legal claim against the Fine and Forfeiture Fund?

"3. If the Costs are payable out of the amount paid to the Clerk, would such Costs include Solicitor's Fees and Trial Tax?

"4. In the event your answer to Question No. 1 is in the affirmative, would the balance be payable into the State Treasury where the fine for the offense committed is payable to the State, namely, violation of the Highway Code and/or rules of the road, Game and Fish laws, etc.?

"5. In the event your answer to Question No. 1 is in the negative would the total amount be payable into the State Treasury in such cases as referred to in Question No. 4?"

In order to clarify the facts, I set out below the order of the court attached to your request for an opinion:

"State of Alabama
Thornton v 19506
J. D. Duffield

Driving while drunk.
Dismissed on payment of $125.00.

"This day in open court came the State of Alabama by its Solicitor and it appearing to the court that the defendant in this case having heretofore agreed through his attorney to enter a plea of guilty and a settlement of this case having been delayed and the case passed because of such failure to so plead; It is ordered by the court that this case be and the same is hereby dismissed on the payment by defendant of $125.00 which is in accordance with the motion this day filed by defendant's attorney; It is therefore ordered and adjudged by the court that this case be and the same is hereby dismissed on condition that defendant pay $125.00 which said $125.00 when collected by the clerk to be by said clerk paid into the county treasury of Mobile County."

You will note that there is no judgment of conviction. There is nothing upon which to base an implication even that the assessment of $125.00 against the defendant was intended as punishment for violation of the crime charged. In fact, the judge orders a **dismissal** of the case against the defendant upon the payment of $125.00 to be paid into the county treasury.

There is no authority of law for such order. In the case of **Driggers v. State,** 123 Ala. 46, the court said:

" 'The judgment entry in all criminal cases where there is a conviction should recite in express words that the defendant is adjudged guilty by the court as found by the jury. **There should always be the**

judgment of the court upon his guilt. In many cases, the judgment entries in this respect are faulty and more attention should be paid by the clerks and judges of nisi prius courts to this important feature. The essential requisities which such judgment entries should contain have been so often pointed out and suggested by this court it would seem that every clerk and judge in the state would know what they are. And it would seem that a compliance with these suggestions is a matter so simple, that all errors in this respect could easily be avoided. Besides it is a matter of too much importance and a duty too clearly imposed by law that the mistake should so frequently occur. It can be accounted for upon no other theory than that the clerk who writes the minute entry is either incompetent or very careless in the discharge of his duties, and the presiding judge fails to read or have the minutes read as he is required by the statute to do."

The defendant having refused to plead guilty and not having been convicted, the assessment against him was unlawful and should not have been collected. It cannot legally be devoted to payment of costs.

Answering your second question, I am of the opinion that the costs are a legal claim against the fine and forfeiture fund of the county under Section 4039, Code of 1923, providing for costs in cases where the State fails to convict.

In the light of the above, your third, fourth and fifth questions do not call for an answer.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 20, 1939.

Hon. Vernol R. Jansen,
301 Masonic Temple Building,
Mobile, Alabama.

Appropriations by the County Board of Revenue and Road Commissioners to the County Department of Public Welfare may legally be made under provisions of the General Act of 1935 (General Acts 1935, p. 762) rather than under Local Acts of 1936, page 76, which expired on February 15, 1939.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 27, 1939, in which you request my opinion as follows:

"By an Act printed in the Local Acts of 1936, page 76, Mobile County was taken from under the general law as to appropriations by the County governing body to the Department of Public Welfare.

"As you will see by this act it expired on February 15, 1939.

"On October 1, 1938, the County governing body adopted their budget which provided for an appropriation of about 12,000 dollars to the Department of Public Welfare. This appropriation has been paid to them by monthly installments, warrants being issued for $400.00 and $650.00 on the first of each month. The money is used as a sponsor contributes, on sewing rooms and other projects. The budget adopted October 1, 1938, is subjected to revision and this 12,000 dollar allowance is not considered a definite appropriation by the Board.

"May the County Board legally draw warrants on the County Treasurer for payment of further monthly installments as appropriations to the Department of Public Welfare?"

"Mr. George Stone, one of our representatives in the Lower House, will discuss this question with you, and I wish you would give him a copy of your opinion."

It appears from your inquiry that the county governing body has made no appropriation to the County Department of Public Welfare for the remainder of the fiscal year from February 15, 1939. By Local Act No. 133, Extra Session of the Legislature, 1936, page 76, it was provided that the Board of Revenue and Road Commissioners or other governing body of Mobile County might in its discretion pay out of the General Fund of Mobile County to the Mobile County Department of Public Welfare such funds as would be reasonably necessary to pay said county's pro rata share for the maintenance and operation of said department, **"but which sum in any fiscal year shall not exceed a total of $18,000."** It was further provided in Section 3 of said Act that the law "shall remain in force and effect until the 15th day of February, 1939."

The apparent purpose of Act No. 133 was to place a limitation upon the amount of money which the County Board of Revenue and Road Commissioners or other governing body of Mobile County might appropriate for maintenance and operation of the Mobile County Department of Public Welfare under Act No. 332 (General Acts 1935, pp. 762, 768), which act created State and county Departments of Public Welfare and provided in Section 14 thereof that:

"The County Board of Revenue, County Court of Commissioners or other governing body of the county or incorporated municipalities within the County shall make joint appropriations for office space, supplies, and **for the maintenance of the functions to be performed by the County Department of the Public Welfare,** and shall mutually participate in the benefits thereof, but the amount to be appropriated by said governing body of the county and by each municipality shall be subject to the approval of the said governing body of the County and the participating municipality or municipalities."

Under the provisions of the foregoing General Act creating the State Department of Public Welfare and setting up the County Departments of Public Welfare, it will be seen that county governing bodies had authority to make appropriations for the maintenance of the functions and the operation of the County Departments of Public Welfare. Local Act No. 133 placed

a limitation on the amount which might be appropriated, i. e., an amount not exceeding a total of $18,000 per fiscal year. By Section 4 of the Local Act all laws and parts of laws in conflict with said Act were expressly repealed. This undoubtedly included Section 14 of the General Public Welfare Act insofar as the same conflicted with the Local Act. However, it is apparent from the face of the Local Act that it was of temporary existence only, Section 3 providing that it should remain in force and effect only until the 15th day of February, 1939.

It is a common-law rule of statutory construction that, when a repealing statute is itself repealed, the first statute is revived without any formal words for that purpose, in the absence of a contrary intention expressly declared, or necessarily to be implied from the enactment by which the last repeal is effected. This rule rests on the theory that each expression of the legislative mind represents the legislative intent at the time of that expression, and that the repealing statute indicates a change of the legislative purpose as expressed in the prior law; and, therefore, when the repealing statute is in turn repealed, without any reference to the pre-existing law, the presumption is that the Legislature intended by the repeal to restore the order of things existing under the repealing statute. **59 C. J. 941, Section 556; 25 R. C. L., Sections 161, 184.** The revival, however, arises not from an implication of intention but from a removal of the pressure which kept the original statute down, thus, the statement contained in the Local Act that it should remain in force and effect until the 15th day of February, 1939, was a declaration that the statute should stand annulled at the appointed time and be as entirely annihilated as if it had not been enacted; so that the General Act abrogated by it might less properly be said to be repealed than suspended. To my mind it cannot be doubted that the Legislature in 1936 intended only to suspend the General Act of 1935 and not to abrogate it, and upon the expiration of the Local Act the General Law again became effective in Mobile County. If this were not so, then, in all probability, the Local Act would have been permanent in operation rather than temporary.

Nor can it be said that that portion of Section 45 of the Constitution of 1901, which provides "no law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred, shall be reenacted and published at length," prevents the operation of the common-law doctrine that when a repealer is itself repealed the original act is thereby revived. In discussing this subject, it is well to premise that there are two distinct modes of reviving statutes that have been repealed, — the one by legislative enactment, the other by operation of laws, as when a repealing act is itself repealed. Therefore, the question to be decided is, does the constitutional provision regulate both or only one of these two methods of revival?

In the case of **Wallace v. Bradshaw,** 23 Atl. 759 (N. J.), the Chief Justice of the Court of last resort of New Jersey, speaking to the question of whether the New Jersey State Constitution which contained the provision, "no law shall be revived, or amended by reference to its title only, but the act revived or the section or sections amended, shall be inserted at length," states:

> "The terms used seem to me to admit of no other meaning that they they **regulate revivals by statute alone.** The phrase that 'no law shall be revived or amended by reference to its title alone' cannot be forced into a signification that will comprehend any revival that is not a statutory

one, for there is not, and cannot be, a revival by operation of laws that can be said to operate on the act revived 'by reference to its title alone.' The clause obviously would have to be interpolated to impart to it that breadth of efficacy claimed for it in the decision before us. Thus it would be necessary to transmute it into some such form as this: 'No law shall be revived by operation of law, nor shall it be revived or amended by reference to its title alone;' and the harmony that would exist in the sentence thus constructed, and its freedom from all tautology, would seem to demonstrate that these methods of revival are diverse and distinct things, and that only one of them is embraced in this constitutional expression. I cannot agree to the proposition that, because the people, in their constitution, have declared that a law shall not be revived by a statutory reference to its title, they have thereby likewise declared that it shall not be revived by the operation of a well-known rule of the common law."

In view of the foregoing conclusion, you are, therefore, advised that any appropriations made by the County Board of Revenue and Road Commissioners to the County Department of Public Welfare may legally be made under provisions of the General Act of 1935 (General Acts 1935, p. 762) rather than under Local Acts of 1936, page 76, which expired on February 15, 1939.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 20, 1939.

Hon. Matt A. Boykin,
Judge of Probate, Mobile County,
Mobile, Alabama.

Taxation — Redemption

A minor heir is not entitled to redeem from a tax sale through the Judge of Probate when the title to the property has passed from the State and the three-year period of redemption has expired. The proper remedy for such claimant is to institute legal proceedings to perfect redemption.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge receipt of your letter of January 12, 1939, which is as follows:

"On June 20, 1929, the State of Alabama purchased certain lands located in Mobile County and assessed in the name of Everett and Boykin. Subsequently on September 24, 1932 and May 28, 1935, J. W. Rivers ob-

tained deeds from the State covering a portion of the lands included in said assessment. On the basis of these deeds, the lands covered thereby were assessed to the said J. W. Rivers and the taxes on the property have since been regularly paid by him.

"On yesterday an attorney filed with us the following affidavit:

" 'State of Alabama
County of Mobile.

" 'Before me, Mary B. Prodos, a Notary Public in and for said State and County, personally appeared ALPHONSE LUCAS, who being by me first duly sworn, on oath says that he is well acquainted with the four children of John Everett, Jr., who was the son of John Everett, deceased, namely: Travis L. Everett, Margie C. Everett, Calvin C. Everett and John O. Everett; that said John Everett, Jr. died prior to October 1, 1928, and that his four children above named were, on June 20, 1929, and still are, minors under 21 years of age and that their duly appointed guardian is their mother, Barbara Everett Young.

ALPHONSE LUCAS

" 'Subscribed and sworn to
before me this 22nd day of
December, 1938.

" '**Mary B. Prodos,**

Notary Public, Mobile County, Alabama.'

"The aforesaid attorney demands that he be allowed to redeem the lands in question for the aforesaid minors, alleging that the said minors owned the lands, deeded by the State to J. W. Rivers, at the time of their sale to the State, and that said minors own said lands at the present time. He has cited us the case of Osborne vs. Waddell, 176 Ala. 232, as well as sections 269 and 270 of the Revenue Code of 1935.

"It is not clear to us, however, if we may properly allow the redemption without the State deeds being in some manner set aside, and we should appreciate your advice on this question. If you hold that the redemption should be allowed without regard to the deeds, then we should appreciate your outlining in detail the proper procedure to be followed in effecting such a redemption."

It is my conclusion that you cannot allow a redemption of the property in question in the manner sought by the attorney for the minors.

This office has held that a mortgage holder of record, who has received no notice from the purchaser at a tax sale, or his assignee, was not entitled to redeem through the Judge of Probate when the title to the land has passed from the State and the three-year period of redemption has expired. Opinion to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County, February 1, 1939, appearing in Book 2-B, Office Edition. This ruling was based on the reasoning that the Judge of Probate is not required to go beyond his records. That after the three-year period of redemption has expired, he must execute a tax deed under Section 241 of the Revenue Acts of 1935 and after same is done, he has no further duty in the premises. Citing **Alabama Mineral Land Company v. McFry et al.,** 184 So. 192.

The matter involved in the above opinion is analogous to your problem and, accordingly, the rule expressed therein is applicable also to a minor attempting to redeem through the Judge of Probate after the title to the property has passed from the State, and the three-year period of redemption has expired.

Sections 268 and 270 of the Revenue Code of 1935 prescribe a ministerial duty to be performed by the Judge of Probate. To allow a redemption in the manner sought would force the Judge of Probate to go beyond his records, and perform a judicial function which he is not authorized to do. It is a well settled rule that the jurisdiction of a Probate Court is statutory, and any attempt to assume jurisdiction beyond its original or clearly defined statutory powers would be void. **State ex rel Garrow v. Grayson,** 220 Ala. 12, 123 So. 573; **Bowen v. Holcombe,** 204 Ala. 549, 87 So. 87.

There is no statutory provision permitting a Judge of Probate to perform this judicial act, and to allow him to do so under the statutes in question would breed confusion and disorder. Therefore, the proper remedy for the claimant in question is to institute proceedings in Chancery to perfect a redemption.

The case of **Osborne v. Waddell,** 176 Ala. 232, 57 So. 698, which lays down the rule that the remedy at law as provided by the Code is adequate, complete and exclusive has been departed from in the later cases of **Georgia Loan & Trust Company v. Washington Realty Co.,** 205 Ala. 288, 87 So. 794; **King v. Artman, 225 Ala.** 569, 144 So. 442; **Watson v. Baker,** 228 Ala. 652, 154 So. 788.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 21, 1939.

Hon. Wilbur DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Monopolies, trusts, unlawful combinations or contracts in restraint of trade and boycotting and blacklisting—

Organization known as Brewers and Alabama Beer Distributors Committee organized for the purpose of policing the beer business in Alabama, by refusing to sell beer to retailers who violate the Alabama Beverage Control Act, held not violative of the constitution or statutes of the State of Alabama.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter in which you request my opinion as follows:

"Within a few days an organization will be completed in Alabama to be known as the Brewers and Alabama Beer Distributors Committee which will work towards improvement in the operation of retail beer establishments.

"This organization will work in cooperation with the Board in breaking up bad spots in the beer business and one of its weapons will be the power to shut off the beer supply to law breaking retailers.

"The Board would like your opinion on the validity of the brewers and distributors combining, or of the distributors combining, for the purpose of refusing to sell beer to retailers who violate the ABC law. This step would be taken solely in the public interest.

"Since the organization is completing its preliminary work, I would appreciate an early answer to this request."

Since the date upon which you made your inquiry, the organization referred to in your letter has been formed.

In order to determine whether or not such an organization composed of the brewers and beer distributors, whose purpose is to police the beer business in Alabama, by refusing to sell beer to retailers who violate the Alabama Beverage Control Act is lawful, we must examine the constitutional and statutory provisions of this State in regard to monopolies, trusts, unlawful combinations and contracts in restraint of trade, and boycotting and blacklisting.

Sacrificing brevity for clarity, we here set out our pertinent constitutional and statutory provisions.

Section 103 of the Constitution of Alabama provides:

"103. The legislature shall provide by law for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade, or commerce, or from increasing unreasonably the cost thereof to the consumer, or preventing reasonable competition in any calling, trade, or business."

Sections 3447, 3449 and 3450, dealing with the subject of boycotting and blacklisting, read respectively as follows:

"3447. Conspiracy, combination or agreement to interfere with or hinder business, unlawful. — Two or more persons who, without a just cause or legal excuse for so doing enter into any combination, conspiracy, agreement, arrangement, or understanding for the purpose of hindering, delaying, or preventing any other persons, firms, corporation, or association of persons from carrying on any lawful business, shall be guilty of a misdemeanor."

"3449. Printing or circulating notice of boycott forbidden. — Any person, firm, corporation or association of persons who prints, or circulates any notice of boycott, boycott cards, stickers, dodgers, or unfair lists, publishing or declaring that a boycott or ban exists or has existed or is contemplated against any person, firm, corporation, or association of persons doing a lawful business, shall be guilty of a misdemeanor."

"3450. Using force or threats against person engaging in lawful occupation. — Any person, firm, corporation, or association of persons who uses force, threats, intimidation, or other unlawful means to prevent any other person, firm, corporation, or association of persons from engaging in any lawful occupation or business shall be guilty of a misdemeanor."

Sections 5212-5214, dealing with pools, monopolies, trusts and combinations and providing penalties therefor, provide respectively:

"5212. Forming pools or combinations to regulate the quantity or price of products. — Any person or corporation who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust, or confederation, to regulate or fix the price of any article or commodity to be sold or produced within this state, or any person or corporation who enters into, becomes a member of, or party to, any pool agreement, combination, or confederation, to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold, in this state, must, on conviction, be fined not less than five hundred, nor more than two thousand dollars."

"5213. Combinations to control corporations with intent to fix the price or production of commodities. — Any corporation chartered under the laws of this state, or any officer, stockholder, agent or employe of any such corporation, which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person, and thereby limit or fix the price, restrict or diminish the production, manufacture, sale, use or consumption of any article of commerce, must, on conviction, be fined not less than five hundred nor more than two thousand dollars."

"5214. Monopolies, penalty for. — Any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production, or which shall monopolize or attempt to monopolize the production, control, or sale of any commodity, or the prosecution, management or control of any kind. class or description of business; or which shall destroy or attempt to destroy, competition in the manufacture or sale of a commodity, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred nor more than two thousand dollars for each offense."

Section 5697 provides for actions against trusts combines or monopolies and reads:

"5697. Actions against trusts, combines, or monopolies. — Any person, firm, or corporation injured or damaged by an unlawful trust, combine, or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of five hundred dollars and

all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly; and may maintain the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. And all such actions may be prosecuted to final judgment or decree against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, judgment, or decree in favor of one or more of the defendants."

Sections 6826, 6827 as amended by Act No. 546, General Acts, 1931, page 647, approved July 23, 1931, and 6828, dealing with contracts in restraint of trade, provide:

"6826. Contract in restraint of trade, void. — Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent, void."

"6827. Exception in favor of purchaser and employers. — One who sells the good will of a business may agree with the buyer, and one who hires as an agent, servant, or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city, or part thereof, so long as the buyer or any person deriving title to the good will from him, and so long as such employer carries on a like business therein."

"6828. Exceptions in favor of partnership arrangements. — Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same county, city or town where the partnership business has been transacted, or within a specified part thereof."

Section 7207, which follows immediately after the section giving foreign corporations the authority to acquire stock of domestic corporations, provides:

"7207. Monopoly, trust, or unlawful combination prohibited. — Nothing contained in the preceding section shall be construed or interpreted as authorizing the creation of any monopoly or trust or unlawful combination in the nature of a trust or monopoly."

Our laws in regard to this subject have been construed as not prohibiting every monopoly, trust, combination or contract in restraint of trade but only as prohibiting such monopolies, trusts, combinations or contracts in restraint of trade as are unreasonable.

In **Citizens Light, Heat and Power Co. v. Montgomery Light, Water and Power Co.**, 171 Fed. 553, we find the following pertinent statement on this subject at pages 561-562:

"Our state Constitution and statutes have not narrowed the play of the law of competition as defined at the common law. Const. Ala. 1901,

Section 103, declared: (Here Section 103 of the Constitution, supra, was quoted.)

"The section is aimed at combinations of capital, to prevent them from making scarce articles of necessity, in order to 'unreasonably' increase the cost to the consumer, and, further, to prohibit anything which prevents 'reasonable competition' in any calling or business. Combinations of capital as such are not denounced. To fall within the purview of the section they must be formed to 'unreasonable' increase the cost. The section is not aimed at everything which restricts competition. Its purpose is not that there shall be no restraints of competition, arising from the workings of the laws of trade, but only that whatever is done in trade must leave the field open to 'reasonable competition.' The indirect effects of fair competition, though in the end it may result in restraining competition, by lessening the number who compete, or in some instances throwing all the trade into the hands of one man, are not outlawed as going beyond the limits of 'reasonable competition.' That competition is the life of trade has passed into 'a proverb of the law.' The section intends to preserve its full operation. Putting the qualifying word 'reasonable' before the word 'competition' could have no other purpose than to declare the intent that restrictions arising from the inevitable effect of competition, lawfully conducted, were not intended to be prohibited — that the 'reasonable competition' for which the Constitution provides did not intend to free competition from the effects, direct or indirect, or any rivalry in trade waged within the bounds of law. If it meant more, competition would be impossible, since all competition, more or less, diminishes, restrains, or restricts the trade of others. The terms 'reasonable' and 'unreasonable' were used with reference to the meaning of these words, as understood and applied in our jurisprudence in the past, in defining what was noxious interference with trade and commerce, as distinguished from lawful rivalry. To give the section any other meaning would defeat its dominant purpose to have 'reasonable competition.'"

To like effect are the following statements from the decision of the Supreme Court of Alabama in the case of **Warren v. Alabama Farm Bureau Cotton Association,** 213 Ala. 61 at pp. 64, 65 and 66:

"The objections to the validity of this contract must therefore be narrowed to a single inquiry: Does the legislative act which authorizes the contract offend any inhibitory provision of the Alabama Constitution?

"The only provision which is pertinent to the inquiry is to be found in Const. 1901, Section 103: (Here Section 103 of the Constitution, supra, was quoted.)

"The obvious effect of this provision is to deny to the Legislature the power to enact laws which would authorize this, or any other of the associations or combinations named, to bring about an artificial scarcity of articles of necessity, or commodities of trade, or to reasonably increase their cost to the customer. There is no question here as to 'preventing reasonable competition in any calling, trade or business.' Manifestly, also, the operation of this association, for the purpose and within the lines prescribed by the act, has no tendency to create any

scarcity of cotton, either by discouraging its production, or unreasonably withholding it from the market.

* * *

"So far as we are advised, no American court has condemned a co-operative marketing contract of the character of this complaint association as injurious to the public interest, or in any way violative of public policy. On the contrary, such contracts have been everywhere upheld as valid, if not positively beneficial to the public interest. Hollingsworth v. Texas Hay Ass'n (Tex. Civ. App.) 246 S. W. 1068; Anaheim Citrus Fruit Ass'n v. Yeoman, 51 Cal. App. 759, 197 P. 959 (hearing by Supreme Court denied); Tobacco Growers' Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231; Poultry Producers v. Barlow, 189 Cal. 278, 208 P. 93; Ore. Growers' Co-op. Ass'n v. Lentz, 107 Ore. 561, 212 P. 811; Washington Cranberry Growers' Ass'n v. Moore, 117 Wash. 430, 201 P. 773, 204 P. 811, 25 A. L. R. 1077; Burley Tobacco Soc. v. Gillaspy, 51 Ind. App. 583, 100 N. E. 89; Castorland Milk & Cheese Co. v. Shentz (Sup.) 179 N. Y. S. 131; Bullville Milk Ass'n. v. Armstrong, 108 Misc. Rep. 582, 178 N. Y. S. 612; Burley Tobacco Growers v. Turner (Circuit Court of Kentucky).

* * *

"Our conclusion is that the contract here exhibited is authorized by the act referred to, and that the act itself is not offensive to section 103 of the Constitution; and that therefore the demurrer to the bill was properly overruled."

In that case, the validity of a contract made by the Alabama Farm Bureau Cotton Association, which was a non-profit sharing association organized and incorporated under an act of the Legislature approved October 29, 1921 (Special Session, Acts 1921, p. 38) was under consideration.

This is substantially the same construction which has been given by the Supreme Court of the United States to the Federal laws on this subject. In the case of the **Standard Oil Co. of N. J. et al v. United States,** 221 U. S. 1, at page 52, we find this statement by the court as to the reasons giving rise to the enactment of our Federal laws on this subject:

"The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation of the products; and 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale."

In the case of **Sugar Institute, Inc. et al v. United States,** 297 U. S. 553, at pp. 597, 598, Mr. Chief Justice Hughes spoke for the court as follows:

"The restrictions imposed by the Sherman Act are not mechanical or artificial. We have repeatedly said that they set up the essential standard of reasonableness. Standard Oil Co. v. United States, 221 U. S. 1; United States v. American Tobacco Co., 221 U. S. 106. They are aimed at contracts and combinations which 'by reason of intent or the inher-

ent nature of the contemplated acts, prejudice the public interests by unduly restraining competition or unduly obstructing the course of trade.' Nash v. United States, 229 U. S. 373, 376; United States v. Linseed Oil Co., 262 U. S. 371, 388, 389. Designed to frustrate unreasonable restraints, they do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law. Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade."

On the basis of these authorities, we think it may be stated that it is not every monopoly, trust, combination or contract in restraint of trade that is outlawed by our constitutional and statutory provisions on the subject but only those monopolies, trusts, combinations or contracts that make an unreasonable restraint of trade, and that the fundamental test is whether or not the conduct complained of is detrimental to the public.

In the instant case, we believe that the organization of the brewers and beer distributors into a self-regulation committee to police the beer business in Alabama, by refusing to sell beer to retailers who violate the Alabama Beverage Control Act is not a monopoly, trust, combination or contract that makes an unreasonable restraint of trade, and that its program is not one that would be a detriment to the public.

Indeed, we think that this self-regulatory program — aimed at the small minority of flagrant violators among Alabama's retail beer outlets — will be a reasonable restraint upon the beer business of our state, and will be beneficial to the public interest.

The premises considered, it is our opinion that the program of the Brewers and Alabama Beer Distributors Committee is valid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 22, 1939.

Hon. R. J. Westbrook,
Clerk, Circuit Court,
Marengo County,
Linden, Alabama.

Circuit Clerk — If a judgment is rendered against a municipal corporation and said judgment carries the costs of the court, a Circuit Clerk may properly issue an execution for the judgment and

costs, but only the property of such municipality which is not used for governmental purposes may be levied on.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion as follows:

"May the Circuit Clerk issue an execution for cost and judgment or for cost only, against a municipality?"

It is my opinion that where a judgment is rendered against a municipal corporation, the said municipality is liable for costs under Section 7221, Code of Alabama, 1923, unless it is otherwise provided by law or directed by the judgment of the Court. It is a well recognized principle of law that the property, real and personal, owned and held by a municipal corporation other than for governmental purposes may be levied upon and sold to satisfy a judgment rendered against it. **Equitable Loan & Security Co. v. Town of Edwardsville,** 143 So. 182, **Southern Ry. Co. v. Hartshorne,** 43 So. 558. However, I call your attention to Section 7889, Code of Alabama, 1923, which is as follows:

"7889. Exemptions in favor of counties and municipal corporations.—All property, real or personal, belonging to the several counties or municipal corporations in this state, and used for county or municipal purposes, judgment, or decree whatsoever."

Therefore, where a judgment has been rendered against a municipality and said judgment carries the costs of the Court, it is my opinion that the Circuit Clerk may properly issue execution for the judgment and costs against the municipal corporation, but only the property of such municipality which is not used for governmental purposes may be levied on.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 22, 1939.

Hon. John C. Curry, Chairman,
State Tax Commission,
Capitol.

Taxation — Income Tax — Deductions.

In view of Section 10140 of the Code of 1923, providing the statutory right of redemption of lands purchased at mortgage foreclosure, sale, taxpayer can claim no deduction in tax return made

during year of foreclosure on account of losses sustained in foreclosure of real estate mortgage executed by him.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of January 14, 1939, in which you request my opinion as follows:

"An opinion is requested as to whether or not a loss sustained by an individual income taxpayer by reason of real estate in which he has an equity being foreclosed under a mortgage, should be computed under Section 345.4, Sub. 9, as to the sale or other disposition of property using the fair and reasonable market value as of January 1st, 1933 as a basis, or should such loss be allowed in its entirety, under Section 345.11, Sub. E, as a loss sustained during the taxable year and not compensated for by insurance or otherwise, as incurred in a transaction entered into for profit.

"During the year 1936 an individual taxpayer claimed a deduction in filing his individual return, Schedule C, — a capital loss of $10,000.00 having been sustained in connection with a foreclosure of real estate which he owns subject to a first mortgage. The property was purchased during the year 1925 at a cost of $27,000.00. It was foreclosed during the year 1936 at a bid price of $9,000.00. The original cost of $27,000.00 less depreciation of $8,000.00 left a balance of $19,000.00, and the loss claimed was measured by the difference between the depreciated cost of $19,000.00 and the foreclosed value of $9,000.00 or $10,000.00.

"The loss was disallowed by the State Tax Commission applying Section 345.4, Sub. 9 and the recent decision of the Supreme Court, State of Alabama vs. J. R. Flenner on the ground that the fair and reasonable market value of the real estate January 1, 1933 did not exceed the sale price of $9,000.00.

"It is the taxpayer's contention that this section is not applicable but the deduction should be allowed in its entirety under Section 345.11, Sub. E."

In my opinion, under the facts submitted, the taxpayer is not entitled to claim a deduction in his tax return for the year 1936 by reason of the alleged loss, whether the same be calculated under Section 345.4, Sub. 9, or under Section 345.11, Sub. E, Revenue Act of 1935.

The deductions allowable, in any event, are "losses sustained during the taxable year."

When a mortgage is past due and unpaid, and the mortgagee forecloses the same, the transaction is not a "sale or disposition of property within the tax year" as is contemplated by Subsection 9 of Section 345.4, supra.

The title of the purchaser at such sale, during the period allowed for redemption, at best, would be inchoate. It is subject to defeasance upon

the exercise by the mortgagor or by any other person entitled to pursue to effect, of the statutory right of redemption.

As noted by the Court in **State v. Flenner,** (Ala. Supp) 181 So. 786, the provisions of the Alabama Income Tax Law are substantial counterparts of the Income Tax Laws of the United States, and the decisions of the United States Courts upon words and phrases therein contained are persuasive of the proper construction to be given to words and phrases employed in like circumstances in the Alabama statute.

The United States Board of Tax Appeals considered the identical situation here involved in **Derby Realty Corporation v. Commissioner of Internal Revenue,** 35 B. T. A. 335. Under the statutes of Michigan, there considered, upon foreclosure of a mortgage upon real estate the purchaser obtains an equitable title rather than a legal title, and the mortgagor retains possession of the real property purchased at foreclosure sale until the expiration of the one-year period of redemption. The taxpayer, a mortgagor whose mortgage had been foreclosed, claimed loss by reason of the fact that the amount bid at foreclosure sale was substantially less than the property cost, and claimed deduction for said loss in the tax year in which the redemption period expired. The Commissioner denied the deduction and held that the loss was deductible as of the year when the sale was held, and not as of the year in which the right of redemption expired. In reversing the Commissioner's ruling, the Board of Tax Appeals said:

> "We do not think it necessary to decide whether under social law legal title remains in the mortgagor until the expiration of the redemption period as petitioner contends, or passes on the foreclosure sale to the purchaser, leaving a mere equitable right in the mortgagor. In any event the purchaser's legal title during such period would be at best inchoate, and what the courts have termed the mortgagor's 'right of redemption' carries with it substantial rights, possessory and otherwise. * * * And we must determine here whether petitioner lost all substantial property or rights in the land when it was sold under the mortgage or only, as petitioner claims, when the right to redeem the land by payment of the mortgage with costs and interest expired.
>
> "It seems obvious to us that petitioner was not divested of material rights until the year 1931, when its right of redemption expired. The deed acquired by the purchaser at the foreclosure sale did not become operative until the end of the redemption period. Secs. 14433, 14434; and if the redemption money had been paid by the mortgagor the deed would, thereupon, have become void, Sec. 14435; and, under Sec. 14436, would have been destroyed. The equity of redemption might be sold, Sec. 14656; and presumably the right of redemption after foreclosure sale also, since anyone lawfully claiming under the mortgagor was given the power to redeem under Sec. 14435. As important for our purposes as the fact that the legal title transferred to the purchaser at the foreclosure sale was defeasible on the redemption payment being made, is the fact that throughout the redemption period the mortgagor was entitled to the possession and usufruct of the land. Lowrie & Robinson Lumber Co. v. Rubin, supra. Whatever the measure of the mortgagor's loss as fixed by the foreclosure sale, therefore, it might be mitigated in the succeeding year by the mortgagor's sale of the right to redeem, sale of the right of possession for a year, or by the rents and profits which

might accrue from such possession. With such substantial rights retained by the mortgagor after the foreclosure sale, we think that event completely undeterminative of the loss."

Section 10140 of the Alabama Code of 1923 provides that where real estate or any interest therein is sold under the power of sale in a mortgage, the same may be redeemed by the debtor, junior mortgagee vendee of the debtor, or assignee of the equity or statutory right of redemption, by the wife, widow, child, heir at law, devisee or any vendee or assignee of the right of redemption, from the purchaser or his vendee within two years thereafter. I have considered Section 10156 of the Code which denominates the statutory right of redemption as a "personal privilege and not a "property right."

But nothwithstanding Section 10156, supra, the amount of the taxpayer's loss, under the facts submitted by you, could not be determined until the expiration of his period of redemption. The Derby Realty Company case, supra, takes up and adversely disposes of all the contentions which reasonably may be made to support the theory that loss accrued in the year in which the foreclosure sale was held. In my opinion, the case correctly decides that the loss cannot be computed until the expiration of the redemption period.

I have considered the memorandum decision styled Godfrey Hammel et al v. Commissioner, decided December 30, 1937 by the United States Board of Tax Appeals, as digested in 384 C. C. H., Section 7123-A. Apparently, that case does not militate against the decision in the Derby Realty Corporation case, supra. In the Hammel case, the investment was in a syndicate and the syndicate mortgaged the property. It is to be noted that the foreclosure proceedings there considered were "without any equity of redemption." That apparently is the distinguishing feature. Under the facts submitted by you, there was a statutory right of redemption, as noted, supra, in this opinion.

Had the United States Board of Tax Appeals intended that its decision in the Derby Realty Corporation case be overruled by the Hammel case, I doubt not that the latter decision would have so stated in plain and unequivocal words.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 23, 1939.

Hon. Chris J. Sherlock.
State Highway Director,
Montgomery, Alabama.

Highway Department authorized to sell toll keeper's house and lot situated at Riverside Bridge.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 25, 1939, in which you request my opinion as follows:

> "Re: Sale of Toll Keeper's House and Lot at Riverside Bridge.
>
> "This Department wishes to be advised as to whether or not, under the provisions of an Act by which the State Highway Department leased the toll bridges by authority of Act No. 219 found on pages 602-604 of the 1935 General Acts of Alabama from the Alabama Bridge Corporation as is provided for by Act 292 found on pages 278-284 of the General Acts of Alabama, 1927, Regular Session, it can sell the toll keeper's house and lot situated at the Riverside Bridge. Inasmuch as the Department has freed the toll bridges and there is no need of keeping and maintaining the said house and approximately one acre of ground, the Department wishes to dispose of same and wishes to be advised as to its authority and steps necessary to accomplish this end."

You also advise that the toll keeper's house is a dwelling house used as a home by the family of the toll keeper and is located some three hundred feet from the end of the bridge.

I find that by conveyance dated April 8, 1937, and signed by Hon. Gaston Scott, as President of the Alabama State Bridge Corporation, in pursuance to resolution of the Alabama State Bridge Corporation passed and adopted on April 7, 1937, that Bridge No. 4, known as the John H. Bankhead Bridge, located across the Coosa River near Riverside on the Anniston-Birmingham Road, State Highway No. 4, between St. Clair and Talladega Counties, which bridge is the one referred to in your letter as the "Riverside Bridge," was conveyed to the State of Alabama subject to the stipulations, conditions and provisions of the mortgage executed to the First National Bank of Montgomery, Alabama, as trustee for the bondholders, signed December 1, 1928, and supplemental agreement executed to the First National Bank of Montgomery, Alabama, dated 18th day of September, 1936.

The only restriction, therefore, on the right of the State Highway Department to dispose of the property in question, title to which is now vested in the State of Alabama, would be those restrictions noted in the above-mentioned mortgages. I have carefully examined both the first mortgage, dated December 1, 1928, and the Amendment thereto dated September 18, 1936, and find that said mortgages were made pursuant to a resolution of the Alabama State Bridge Corporation dated September 28, 1928, which authorized the execution of a mortgage to cover "the bridges and tolls only." It appears that the first mortgage was executed December 1, 1928, in accordance with such resolution, the instrument specifically designating the property covered thereby as the "bridges hereinabove described and set forth in the resolution adopted by the Bridge Corporation on September 28, 1928 * * * and also the tolls to be collected therefrom." The Amendment to the first mortgage dated September 18, 1936, does not alter the provisions contained therein with reference to the property subject to said mortgage.

In my opinion, there is no encumbrance on the dwelling house and the property on which it is located because of the mortgage instruments referred to above. It is clear that the only property to which the bondholders might

look by virtue of said mortgages were the bridges and the tolls to be derived therefrom. Certainly it could not be said that a plot of ground with improvements thereon located three hundred feet from the bridge was a part of such bridge within the meaning of the mortgage agreements even though it might be necessary to erect such a house for the convenience of the toll collector. See numerous cases collated in Words & Phrases, "Bridges."

Further answering your inquiry with reference to the steps necessary to accomplish the disposition of such property, you are advised that the same should be sold in all respects in accordance with the law relating to the disposition of other real property now owned by the State of Alabama. (See Code of Alabama 1923, Section 6851.)

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 24, 1939.

Hon. Howard Kirby,
Clerk Circuit Court,
Etowah County,
Gadsden, Alabama.

Bonds —

Sureties on bail bonds may be exonerated by surrendering defendant to sheriff.

Opinion by Assistant Attorney General Mitchell.

Dear Sir:

I have your letter of March 2, 1939, in which you request my opinion as follows:

"I am very anxious to get an opinion on the following:

"In a case where a defendant has been convicted and sentenced in the Circuit Court, gives notice of appeal, and files an Appearance Bond pending such appeal, can a surety come off of this bond by obtaining a certified copy of the said bond from the Circuit Clerk, and authorizing the rearrest of the Defendant, before the case is heard in the Appellate Court?

"Would the same rule also apply to withdrawing from an Appearance Bond from the County Court to Circuit Court?"

A surety may be exonerated as bail by surrendering the defendant to the sheriff of the county in which the defendant is bound to appear. He is

not released merely by procuring a certified copy of the bond and **authorizing** the defendant's arrest. It is the responsibility of the surety to arrest the defendant, using the certified copy of the bond as his authority in making the arrest. If the surety wants the sheriff or someone else to make the arrest, he may endorse the certified copy of the bond to such person delegated to make the arrest and pay all expenses incident thereto.

Section 3384, Code of 1923 reads:

"Bail discharged by surrender of principal; may arrest, or authorize arrest, of principal. Bail may, at any time before a conditional judgment is rendered against them, exonerate themselves by **surrendering the defendant**; and for that purpose they may arrest the defendant on a certified copy of the undertaking at any place in the state, or may authorize another person to arrest him by an indorsement in writing on such copy." (Emphasis ours).

Section 3386 provides:

"Surrender of defendant to sheriff necessary to exonerate bail; when new bail allowed. — To exonerate the bail, the **surrender of the defendant must be made to the sheriff** of the county in which the court is held to which the defendant is bound to appear, or to which the trial has been removed; and if the charge is for a misdemeanor, the sheriff may discharge him on his giving new bail; otherwise, must keep him in jail until discharged by law." (Emphasis ours).

In the case of **Ex Parte Williams**, 114 Ala. 29, the Court held:

"By statute bail may, at any time before or during the trial, exonerate themselves by surrendering the defendant."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 25, 1939.

Hon. O. C. Bottoms,
Superintendent of Education,
Etowah County,
Gadsden, Alabama.

Schools—County Board of Education has no authority to assume payment of bonds issued by a city for building high school under Acts 1907, page 728, and Acts 1909 (Special Session) page 230, and subsequent amendments thereto.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 20, 1939, in which you request my opinion as follows:

"Under an act of the Legislature of 1907, it was provided that a county high school should be established in each county in the State of Alabama with the facilities and building for that school provided by the community or city in which it was located. In accordance with the terms of that act, a high school was established called the Etowah County High School and located in the City of Attalla, Alabama, which city built the building. For the purpose of building this school building the city of Attalla issued bonds in the amount of $20,000.00, on which the interest but none of the principal has been paid regularly. During the thirty years or more which have elapsed since that time, this school has been entirely under the control and management of the County Board of Education and County Superintendent of Education and it is considered and is the property of the State of Alabama. These bonds are now about to become due and the question which has arisen and on which I would like your opinion is whether or not the Etowah County Board of Education can legally assume the payment of those bonds or any part thereof. It is, of course, understood that there is no obligation on the part of the County Board of Education to pay these bonds they being simply bonds issued by the City of Attalla as bonds of the City of Attalla and actually having no connection with the county school system except for the fact that the money used for the erection of the County High School building."

I am of the opinion that your inquiry should be answered in the negative.

The 1907 Act to which you refer is Act No. 757, S. 384, approved August 7, 1907 (General Acts 1907, p. 728). This act was incorporated in the Code of 1907 as Sections 1861-1868. Section 3 of the 1907 Act provides as follows:

"That any county, where the citizens thereof shall secure a suitable site which shall consist of not less than five acres of land the title of the surface of which shall be in fee but the land need not include mineral rights and erect thereon a good and substantial building with all the necessary equipments for a high school, the cost of said land, building and equipments to be not less than five thousand dollars, and making a deed to the State of Alabama of said land, building and equipments, there shall be appropriated out of any moneys in the treasury not otherwise appropriated the sum of two thousand dollars for the payment of the teachers in said high school, or high schools complying with the provisions of this act, and this appropriation is hereby made to continue annually, provided further that none of said two thousand dollars shall be devoted to any other purpose whatever than the payment of teachers' salaries, and provided further that the same shall be paid quarterly upon warrants drawn by the county board of education in the county in which said high school is located, said warrant or warrants to be subject to the approval of the commission hereinbefore created."

The above is substantially the same as Section 1862 of the Code of 1907.

Sections 1861, 1862 and 1863 were amended by Acts of 1911, page 324, but the amendments are not material to your inquiry.

Act No. 94, S. 66, approved August 26, 1909 (General and Local Acts, Special Session, 1909, p. 230) authorized cities and towns of this State to

convey real or personal property and to make appropriations from city funds and issue bonds to aid in the location and in the construction of high schools and high school buildings, under an Act approved August 7, 1907, (General Acts 1907, p. 728); and to confirm and ratify all such conveyances and appropriations heretofore made in accordance therewith. Act No. 105, S. 114, approved April 5, 1915, (General Acts 1915, page 203) amended the 1909 Act, supra, to include Sections 1861, 1862 and 1863 of the Code of 1907, which sections, as above stated, were part of the 1907 Act, supra, incorporated in the 1907 Code.

In the case of **Kumpe v. Bynum,** 158 Ala. 311, 48 So. 55, decided December 15, 1908, it was held that counties were without authority to appropriate funds of the county toward the erection of a building for high schools erected pursuant to the provisions of General Acts 1907, page 728, supra. This holding was based on the theory that the word "citizens" of the county was not intended to mean the county itself. The same is true of a city or a county board of education. In other words, the effect of the holding is that a political subdivision of the State cannot appropriate funds to another subdivision unless authorized by law, either expressly or by necessary implication. Acts of 1909 (Special Session), page 259, gave counties the express authority to appropriate funds for high schools under the 1907 Act, supra. Likewise, Acts of 1909 (Special Session), page 230, supra, gave cities and towns such authority. These acts and subsequent amendments thereto were enacted to meet the decision of the case of **Kumpe v. Bynum,** supra, as regards counties and cities or towns.

There is nothing contained in any of the above-cited acts or code sections, or any other legislation that I am able to find that authorizes a reimbursement of the money expended for the high school in question. Same, in my opinion, was in the nature of a contribution or gift to the schools.

Section 137 of the School Code of 1927 has no application in the instant case. Said section provides as follows:

> "District Tax May Be Used for Building and equipment.—The respective county boards of education and city boards of education in the respective counties and cities of the State of Alabama may appropriate and use any district three mill tax that has been or may hereafter be voted in any school district to pay and discharge any obligations or debts which may have been or hereafter are created to build, furnish or equip a public school building for said school district, or to refund money out of the said three mill district tax to any person or corporation who has or may hereafter advance money for such purpose."

It will be noted that said section authorizes a refund to any person or corporation who has or may hereafter **advance money** for such purpose. "Advance money" as herein used, in my opinion contemplates a loan transaction to the County Board of Education with the understanding that same be paid back. It does not contemplate a contribution or gift to said body. See opinion rendered to Hon. Chas. W. Lee, State Comptroller, May 1, 1935 (Office Edition Rep. of Attorney General, Book 4-A, p. 6) also opinion of Attorney General to County Superintendent of Education of Walker County on April 17, 1931 (Office Edition Rep. of Attorney General, Vol. 3, p. 267), copies of which are herewith enclosed for your convenience.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 25, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Under Act No. 468, General Acts 1931, page 550, Board of Revenue of Montgomery County has authority to purchase an automobile and pay the expenses of operating the same, furnish a telephone, envelopes, letter heads, etc. for License Inspector from the contingent fund therein created.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion under date of March 10, 1939, which is as follows:

"Please refer to Act No. 468, (General Acts 1931, page 550) and advise me as follows:

"1. Can the Board of Revenue of Montgomery County purchase an automobile, pay the expense of operating same and furnish telephone, envelopes, letter heads, etc., for the License Inspector from the Contingent Fund so created?"

Act No. 468 herein referred to by you reads as follows:

"Section 1. That Courts of County Commissioners, Boards of Revenue, and other Courts of like jurisdiction, in counties in this State having a population of not less than 75,000 and not more than 100,000 according to the Federal Census of 1930, and which may hereafter have such population according to any Federal Census hereinafter taken, are hereby authorized to appropriate out of any moneys in the county treasury not otherwise appropriated and to expend not exceeding the sum of $7000.00 per annum for **any county purposes not otherwise provided for by law that in their judgment are worthy and for the interest of the county, the fund hereby authorized to be created to be known as the 'Contingent Fund.'**" (Emphasis supplied).

It is my opinion, after carefully reading this act, that your question should be answered in the affirmative. The provisions of this act are very broad and place at the disposal of the Board of Revenue of Montgomery County the sum of $7,000 per annum for any county purpose not otherwise provided for by law that in their judgment are worthy and for the best interest of the county. The same line of reasoning is followed in the following opinions rendered by this office: Opinions of the Attorney General, Office Edition, Book 3-A, page 155; Quarterly Report of Attorney General, Volume IX, page 54.

If the Board of Revenue in its judgment feels that it is worthy and for the best interest of the county that the License Inspector be provided with an automobile and the other things mentioned in your request, then it is my judgment same can be paid for out of the contingent fund created by said Act No. 468.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 25, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

The adoption of the Code with general provisions setting up a complete system of fees of justices of the peace, being general and applicable to all the counties of the State, repealed all local laws in direct conflict with same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your request for official opinion of February 14, 1939, which is as follows:

"Please refer to a Local Act (Local Acts of 1898-99, page 563), Sections 3753, 3754 and 7289, Code of Alabama, 1923, and advise me as follows:

"1. Did the adoption of the 1901 Constitution repeal such Local Act?

"2. If the adoption of the Constitution did not repeal such Local Act, did the adoption of the Code of 1923 repeal such Local Act?

"3. If your answer to questions No. 1 and No. 2, is in the negative, has a general law been passed covering the subject matter of the Local Act that would repeal such Local Act?

"4. In the event your answer to the above three questions is in the negative, would the Justice of the Peace be entitled to fees for services that are provided for by the General Law and not provided for by the Local Act?"

We do not deem it necessary here to pass upon the question as to whether or not the adoption of the Constitution of 1901 repealed a local act for Tallapoosa County, Local Acts 1898-99, page 563, fixing the charges and fees of justices of the peace in said county, since we are convinced that in the adoption of the Code of 1907 it was repealed by Section 3724, Code of Alabama 1907. This section, as adopted, fixes the fees and allowances of justices of the peace and was applicable to all the counties of the State. If it was not the intent of the Legislature that the Local Act of 1898-99, supra, be repealed by this section, then it would be saved by Section 10, Code of Alabama 1907, now Section 11 of our present Code. The interpretation of Section 3724, supra, makes it manifest that it was the general intent of the Legislature by the adoption of that section, to establish a uniform system throughout the State fixing the fees and allowances of justices of the peace in the several counties of the State, and the presumption must be that the Local Act on the same subject matter and inconsistent with it is intended to be repealed, 36 Cyc. 1090, 1091 and cases cited; 26 American & English Encyc. of Law (2d ed.) 733, 742, and authorities cited in Note 2.

Repeal by implication is not favored; yet the two acts are in conflict and where one revises the whole subject matter of the former, sets up a new

system, or restates the entire law on the subject, the former is repealed. **Gibson v. Mabry,** 145 Ala. 112; **Edison v. State,** 134 Ala. 50.

Applying these principles of construction to the statute and the law and the act under consideration, we are of the opinion that the adoption of Section 3724, supra, as a part of the Code of 1907 repealed the Local Act of 1898-99, supra. **Isbell v. Shelby County,** 10 Ala. App. 639; **Barnes, Court Clerk v. State ex rel Tate,** 162 So. 404.

Section 3724, supra, has been carried forward as Section 7289 of the Code of 1923, and the provisions of this section cover the fees to be paid to justices of the peace in Talladega County for services rendered at the present time.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 25, 1939.

Hon. O. L. Andrews,
Clerk, Circuit Court,
Jefferson County,
Birmignham, Alabama.

Taxation—Home Owners Loan Corporation not subject to State Trial Tax or Library Tax, as same is an instrumentality of the United States Government.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your request for opinion of March 7, 1939, as follows:

"I am inclosing you the letter from Mr. W. G. Stone, State Counsel for the Home Owners' Loan Corporation, in reference to the payment of the $3.00 state trial tax and $1.00 library tax, under opinions already rendered the National Banks and Reconstruction Finance Corporation are not required to pay these two taxes.

"I would like to have your opinion as to whether the Home Owners' Loan Corporation is subject to these two taxes."

It is my conclusion that the Home Owners' Loan Corporation is not subject to the State Trial Tax or a Library Tax.

Subsection (c) of Section 1463, United States Code Annotated (Home Owners Loan Act of 1933) provides in part as follows:

"* * * The bonds issued by the corporation under this subsection shall be exempt, both as to principal and interset, from all tax (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; * * *"

The above Act creating the Home Owners' Loan Corporation specifically prescribes that said corporation shall be an instrumentality of the United States Government, and as such, is not subject to taxation.

This office has held that a Federal Agency or instrumentality thereof cannot be charged a Trial Tax as provided by Section 9 of Act No. 194, General Acts of Alabama, 1935, page 263. **Quarterly Reports, Attorney General,** Vol. 12, page 11. Accordingly, the Home Owners' Loan Corporation is not liable for such a tax.

This office has ruled also that Act No. 259, General Acts of Alabama, 1927, page 261, which provides for the Library Tax in question, was enacted for the purpose of raising revenue, and that the levy of this tax is similar to the Trial Tax prescribed by law for such courts. **Quarterly Report, Attorney General,** Vol. II, page 47. Therefore, for the reasons stated above, it is my opinion that the Home Owners' Loan Corporation is not subject to said tax.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 25, 1939.

Hon. Roy Sanderson,
Judge of Probate,
Marion County,
Hamilton, Alabama.

Courthouses—Municipal Bond Code—

Construction of courthouses held not to be included in the term "other public buildings of all kinds" in Section 2 of the General Acts of 1935, page 195, but governed and controlled by Section 2294 of Michie's Code of 1928.

Bond Elections —

Elections held by a county for the purpose of issuing revenue raising bonds for the purpose of repairing or building a courthouse in the county held to be governed and controlled by provisions of Section 2294, Michie's Code of 1928.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of August 26, 1938, in which you request my opinion as follows:

"Marion County contemplates improvements in its courthouse. Please let me have your opinion on the following:

"(a) Refer to General Act No. 154, page 195, General Acts 1935 Would courthouses clearly be embraced in the term 'other public buildings of all kinds,' in Section 2 of said act found near the close of subdivision 1 of said Section 2? Is a courthouse such an undertaking against which revenue producing bonds could be issued as provided in said act, without resorting to an election on the question of bonded indebtedness?

"(b) If the county should hold an election under Article 13 of the Code of 1923, could this election properly be held on the same day and by the same election officials who serve at the General Election in November?

"(c) Under an election to be held under Article 13 of the Code of 1923 for the purpoes of issuing bonds for the purpose of constructing additions to the courthouse, would such construction of additions be authorized under Section 250 of the Code of 1923 the same as for constructing outright? If said election should be held on the day of general election and by the same election officials serving at the general election, would a simple majority who voted on the bond issue be sufficient to authorize the issuance of the bonds under Section 260 of the 1923 Code or would it require a majority of all voting at said election, whether they voted on the bond issue or not?"

In reply, I wish to advise you that in my judgment Act No. 154, General Acts 1935, page 195, does not contemplate courthouses in the provision "other public buildings of all kinds." You will observe from reading this Act as a whole that the legislative intent there expressed is to authorize only such buildings as will not impose a debt or obligation upon the municipality that will not be self-liquidating. No obligation which will require the levy of a tax to pay or a pledge of the credit of a municipality can be included within the terms of this statute.

I wish to particularly refer you to Sections 10 and 12 of the above-cited Act, which provide as follows:

"Section 10. TAX LEVY TO PAY BONDS PROHIBITED. No holder or holders of any bonds issued under this act shall ever have the right to compel any exercise of the taxing power of the municipality or the payment of any funds other than the revenue from such undertaking to pay said bonds or the interest thereon; and every bond issued under this act shall contain a recital to that effect."

"Section 12. UNDERTAKING TO BE SELF-SUPPORTING. The governing body shall prescribe and collect reasonable rates, fees, tolls,

rents or charges for the services, facilities and commodities of any undertaking for the acquisition, construction, reconstruction, improvement, betterment or extension of which, revenue anticipation bonds are issued under this act, and shall revise such rates, fees, tolls, rents or charges from time to time whenever necessary so that such undertaking shall be and always remain self-supporting. The rates, fees, tolls, rents or charges prescribed shall be such as will produce revenue at least sufficient (a) to pay when due all bonds and interest thereon for the payment of which such revenue is or shall have been pledged, charged or otherwise encumbered, including reserves therefor, and (b) to provide for all expenses of operation and maintenance of such undertaking, including reserves therefor."

The answer to the second part of your first questions is found in the answer to your other questions and is therefore for the time being, pretermitted.

In reply to part (b) of your request, I wish to advise that Article XIII of the Code of 1923 was repealed by the Municipal Bond Code (General Acts 1927, page 535) and is at present designated as Article 40(a) of Michie's Code of 1928 and 1936 supplement thereto. If an election is desired for the purpose of improving, extending, enlarging and repairing or securing the more complete use and enjoyment of any building or improvement owned by the county, such election is authorized and governed by Section 2294 of Michie's Code of 1928, supra. I wish particularly to call your attention to paragraph three of Section 2294, Subsection 6, supra, which provides as follows:

"* * * For extending, enlarging, improving, repairing or securing the more complete use of and enjoyment of any building or improvement owned, purchased or constructed by a municipality, for equipping and furnishing the same. * * *"

and further to the first sentence of Section 2294, Subsection 6, which authorizes an election for the purpose above outlined, as follows:

"All municipalities shall have full and continuing power and authority within the limits of the Constitution now in effect or that may be hereafter provided, to issue and sell bonds when such issue is authorized by the election herein provided for, * * *"

In my judgment, the above-quoted provisions of law definitely authorize an election to provide for the sale of bonds for the erection or repair or enlargement of the courthouse in a county.

The election here provided for, in my opinion, could properly be held on the same day as the general election in November, but would in all respects be governed and controlled by Section 2294, supra, Subsections 7, 8, 9, 10, 11, 12, 13 and 14. I wish to call your particular attention to Section 2294, Subsections 7, 8, 9, 10, 11 and 12, which provide as follows:

"2294(7). Notice of election.—Notice of any election held under the provisions of this article shall be given by publication in a newspaper published in the municipality in which such election is to be held, once a week for three successive weeks, the first publication to be made at

least 30 days before the election, which notices shall state the purpose for which the election is to be held, and the time and place of holding the same, and amount of the proposed bond issue, the maximum rate of interest the bonds are to bear, the time or times when the bonds are to mature and the amount that is to mature at each such time, and the purpose for which the bonds are to be issued, and such notice shall be signed by the mayor, or other chief executive of such municipality in which such election is to be held, and if no newspaper is published therein, such notice must be posted in five public places in said municipality at least thirty days before the time of holding said election."

"2294(8). Ballot; form and contents of.—The ballot used at such election shall be prepared under the direction of the mayor or other chief executive officer and shall be in such form as may not be inconsistent with the constitution of Alabama."

"2294(9). Conduct of election.—The governing body of any municipality, in which an election is held under this article, shall designate the number and location of voting places, and shall appoint three managers, two clerks, and one returning officer for each voting place in such municipality to conduct said election. The mayor or other chief executive shall notify the managers, clerks and returning officers of their appointment, and shall deliver the box and ballots to the managers at the several voting places in the municipality."

"2294(10). Expenses of election.—All expenses for holding such election shall be paid out of the treasury of the municipality in which the same is held and the managers, clerks, and returning officers shall be entitled to the same compensation as managers, clerks, and returning officers at other municipal elections."

"2294(11). Canvass, returns and declare results.—The governing body of such municipality in which an election has been held under this article, shall constitute a board to canvass the returns and declare the result of such election, and such governing body shall meet at the usual place of meeting on the day after the date of holding such an election and at that time or at a subsequent meeting, to which such meeting may be adjourned, shall canvass the returns and declare the result of said election."

"2294(12). Record of result of election.—The record of the result of the election as ascertained and declared by the board of canvassers shall be recorded in the minutes of the proceedings of such municipality, and when so recorded shall be conclusive evidence of the matters therein stated, and the validity of such election, unless contested, as hereinafter provided. No form shall be required for such record, but it will be sufficient if the record plainly and manifestly shows the votes cast for and against the proposition submitted to the electors."

In my judgment, the officers provided for elections of this nature, as found in the above-quoted provisions of law, must be appointed in accordance with the provisions of Section 2294, Subsection 9, supra, although the same officers appointed by law to conduct the general election at the various voting places may be designated by the governing body of the county in which the election is to be held. The election, however, for the purpose of voting on

the issuance of the bonds herein named would be separate and apart from the general election and would require a majority of those voting in this separate election upon the issuance of the bonds and not a majority of those voting in the general election, which would be separate and apart from the bond election.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 25, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

OPINION BEING RECONSIDERED—DO NOT FOLLOW.

Sheriffs—Costs and fees—

1. Guard fee provided for by Section 3741 of the Code accrues on trial, in Circuit Court, of appeal from conviction of city ordinance, and defendant is found guilty on appeal and does not pay the fine and costs accrued in the city court and the costs in the Circuit Court.

2. Guard fee provided for by section 3741 of the Code accrues upon conviction for violation of state law of a defendant by a Justice of the Peace or recorder, sitting as ex officio Justice of the Peace, and, upon defendant being proved insolvent by return of execution "nulla bona", fee may be payable out of Fine and Forfeiture Fund.

3. Guard fee provided for by Section 3741 of the Code accrues in cases where defendant is convicted in the Circuit Court and is sentenced to hard labor or to jail, and is payable out of Fine and Forfeiture Fund upon return "nulla bona" of execution issued against defendant.

4. Guard fee provided by Section 3741 of the Code accrues in cases where defendant is arrested on felony charge and is discharged on preliminary hearing or is bound over to the Grand Jury which fails to indict him therefor.

5. Sheriff's fees in bastardy proceedings before a Justice of the Peace in case where a defendant is discharged are taxable against and payable by the complainant, and cannot be paid from any county fund.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of inquiry, in which you request my opinion as follows:

"Please advise me as follows:

"1. A defendant is convicted of violating a City ordinance and from such convictions appeals to the Circuit Court and is released from the City Jail upon making bond. In the Circuit Court such defendant is convicted and on failure to pay the fine and costs is sentenced to hard labor for the City. Sentence having been passed, the Sheriff of the County takes such convicted person into custody and places him in jail, this being the first and only time such convicted person has been in the County Jail for such offense, to hold until the City authorities call for him to serve his sentence.

"Taking into consideration the facts presented, would the Sheriff be entitled to a Guard Fee for holding such convicted person for delivery to the City authorities after his conviction and sentence?

"2. If your answer is in the affirmative, from what fund of the County would same be payable?

"3. A defendant is tried by a Justice of the Peace or City Recorder for violating a State law, and on conviction and failure to pay fine and costs is sentenced to Jail for a given number of days. After such conviction the Sheriff receives such convicted person and commits him to jail, this being the first and only time such convicted person is committed to the County Jail for such offense to serve his sentence.

"Taking into consideration the facts presented, would the Sheriff be entitled to a Guard Fee for holding such convicted person in the County Jail while he is serving his sentence for failure to pay fine and costs?

"4. If your answer is in the affirmative, from what fund of the County would same be payable?

"5. A defendant is arrested and, before being committed to jail, makes bond and when tried is convicted and sentenced to the penitentiary, to hard labor or to Jail. After conviction the Sheriff commits such convicted person to jail to serve his jail sentence or to hold him for delivery to the proper officials.

"Taking into consideration the facts presented, would the Sheriff be entitled to a Guard Fee for holding such convicted person, under such conditions, in the County Jail?

"6. If your answer is in the affirmative, from what fund of the County would same be payable?

"7. A defendant is arrested for a felony and on **preliminary hearing** is discharged or is bound over to the Grand Jury and the Grand Jury jails to indict.

"Taking into consideration the facts presented, would the Sheriff and Clerk be entitled to any fees for services performed under either condition?

"8. If your answer is in the affirmative, from what fund of the County would same be payable?

"9. A defendant is arrested for a Misdemeanor and, when arraigned before a Justice of the Peace or Inferior Court, demands a Jury Trial. The papers are forwarded to the Grand Jury and the Grand Jury fails to indict.

"Taking into consideration the fact presented, would the Sheriff and Clerk be entitled to any fees for services performed?

"10. If your answer is in the affirmative, from what fund of the County would the same be payable?

"11. Can a sheriff collect fees, for services performed in a Bastardy proceeding before a Justice of the Peace or Inferior Court, from any fund of the County when the defendant is discharged?

In my opinion, your first inquiry must be answered in the affirmative.

Section 3741 of the Code of 1923 provides, in part, as follows:

"Sheriffs are entitled to the following fees and allowances in criminal cases—that is to say: * * *

"For guarding each prisoner lawfully committed to jail in the following cases:

"In all felony cases whether convicted or not $2.00

"In all arrests under indictment whether convicted or not 2.00

"In all other cases where convictions follow arrests ..... 2.00"

Section 1937 provides for the appeal from conviction in a municipal court of violation of a municipal ordinance to the Circuit Court or court of like jurisdiction.

Section 1938 provides that if judgment is rendered against a defendant on said appeal, the court shall impose such punishment as seems proper under said ordinance and remand the defendant to the city authorities for execution of the same.

Section 1942 provides.

"After the prisoner has worked out the said fine and costs due the city, or served the sentence of the court, he shall, unless said costs are paid, be delivered to the sheriff of the county to work out the costs incurred in said circuit court or other court, for which sentence shall be passed on him at the time of rendering judgment against him in the same manner and to the same extent as if said costs had been incurred in a case for violation of state law."

Upon the conviction of a defendant in the Circuit Court on appeal from conviction of violation of a municipal ordinance in a municipal court, and

the defendant fails to pay the fine and costs assessed against him for the use of the municipality, together with the cost of the appeal in the Circuit Court, the judgment imposes two types of punishment upon him. The one punishment is executed by remand to the city authorities for that purpose; and the other punishment is sentenced to hard labor for the county for a sufficient number of days to pay the costs on appeal at the rate provided by law.

So that, in taking the defendant into custody and keeping him in jail, the sheriff is executing the process of the state court for the benefit of the city and for the benefit of the State.

In such cases, in my opinion, he is entitled to the guard fee provided by Section 3741, supra; and he may have execution issued against the defendant for the collection of the said guard fee.

The proper judgment, and the precedure for the execution thereof, in case of appeal from conviction in a municipal court for violation of a municipal ordinance, which appeal results in judgment against the defendant, which he does not satisfy by the payment of fine and costs, is pointed out in Dowling v. Troy, 1 Ala. App. 805. There the defendant was convicted in the city court for violation of a city ordinance and appealed to the Circuit Court. The appeal was determined against him and he failed to pay the fine imposed and the costs taxed for the use of the Municipality and failed to pay the costs in the Circuit Court. The judgment of the court, after imposing the punishment for violation of the city ordinance and assessing him with the costs of the city court, remanded him to the city court for the execution of that part of the judgment. It then continued as follows:

> "It is further considered and adjudged by the court that after the defendant has served his term of punishment with the city of Troy, he shall be delivered to the sheriff of Pike County to work out the costs incurred in this court, and the said defendant is hereby sentenced to work 66 days at hard labor for Pike County to pay the costs of this court at 40 cents per day, sentence begins at the expiration of his term of service to the city of Troy."

If substantially that procedure were followed in judgments rendered by county and Circuit Courts on appeals from convictions of violations of city ordinances, the matters to which your inquiry is addressed would be very much simplified.

Answering your second inquiry, it is my opinion that in no event would the guard fee in such cases be payable from any county fund.

Answering your third inquiry, in my opinion, the guard fee, which is in reality a "turnkey" fee, accrues to the sheriff under the facts stated therein.

In a conference had with the writer of the request for opinion, I have ascertained that the question in his mind is, whether or not the guard or "turnkey"fee can be imposed upon the defendant **after** conviction, in view of the fact that Section 3740 provides, in part, that:

> "All other specified fees for such services as are rendered in the case must be taxed as cost against the defendant, on conviction * * *."

I understand from such conference that the writer of the request for opinion interprets the phrase "on conviction" to mean "up to the moment of conviction;" and that as he interprets the same, any item of cost which has not already accrued at the time of the **conviction** of the defendant cannot be taxed as cost against him. This interpretation is wholly erroneous. As used in the statute, supra, the phrase "on conviction" connotes "in the event of conviction." The fact that the guard or "turnkey" fee accrues to the sheriff after the defendant has actually been convicted does not prevent the court from taxing the same against the defendant as costs.

And, under the facts in your third inquiry, the sheriff would be entitled to execution against the defendant for the costs, including a guard or "turnkey" fee.

Answering your fourth inquiry, it is my opinion that the sheriff's "turnkey" fee, under the circumstances detailed in your third inquiry, may be payable from the fine and forfeiture fund. **Stone, Treasurer v. State ex rel. Holcombe,** 197 Ala. 293—**Cf. Cabler v. Mobile County,** 230 Ala. 118; **State v. Stone,** 233 Ala. 243.

Section 1935 of the Code provides in part:

> "Such recorder is especially vested with and may exercise in the city and within the police jurisdiction thereof, full jurisdiction in criminal and quasi criminal matters * * * and shall have the power of an ex-officio justice of the peace except in civil matters."

In my opinion, in cases where the Justice of the Peace or the recorder, as an ex officio Justice of the Peace, has final jurisdiction of an offense against a state law, on conviction of the defendant, the guard fee of the sheriff is properly allowed as an item of cost.

And, in the event execution against the defendant is returned "nulla bona," the item of cost properly may be paid out of the Fine and Forfeiture Fund, as is provided by Section 4039 of the Code.

Your fifth inquiry must be answered in the affirmative upon the same reasoning and authority pointed out herein in answer to your third inquiry. The fact that the defendant is not committed to jail until **after** his conviction is not pertinent.

Answering your sixth inquiry, the guard fee in such cases may be paid from the County Fine and Forfeiture Fund as is provided by Section 4039 of the Code, supra, in the event the defendant is proved insolvent by return of execution "nulla bona."

The second subsection of the excerpt from Section 3741 of the Code, supra, specifically answers in the affirmative your seventh inquiry, in so far as guard fee is concerned. Your inquiry is too general to admit of accurate answer as to "any fee." If you have a specific case in mind, I shall be pleased to advise you further upon your request therefor.

Answering your eighth inquiry, in so far as the same applies to sheriff's guard fee, in my opinion, it properly may be paid from the Fine and For-

feiture Fund in the event the insolvency of the defendant is proved by return of execution "nulla bona."

Your ninth inquiry is laid in too general terms to admit of accurate answer. If you have any specific case, I shall be pleased to advise you further. This obviates the necessity of an answer to your tenth inquiry. However, no guard fee can be paid from the Fine and Forfeiture Fund. **Kilgore v. Swindle,** 219 Ala. 378.

Answering your eleventh inquiry, it is my opinion that the sheriff's costs in bastardy cases cannot be collected from any county fund. This situation is specifically provided for by Section 3438 of the Code:

> "In case the issue provided for by Section 3425 is found against the complainant, judgment for costs must be rendered against her."

Cf—Biennial Report of the Attorney General 1930-32, page 665 and cases there cited.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 25, 1939.

Hon. John Brandon,
Secretary of State,
Capitol.

Legislature—Public Printing

In pursuance of section 2931 of the Code of 1923, on a recess of the Legislature for a period longer than thirty days, only one copy of General Acts passed before the recess shall be collected in bound form and delivered to the Secretary of State.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated March 14, 1939, which is as follows:

> "An interpretation of the last clause of Section 2931 of the Code of 1923 is requested. Section 2931 reads as follows:
>
> "'Bond of printer; condition of.—In making the contract for the publication of the acts of the legislature, the governor shall require the printer to give bond in such sum as he may direct, conditioned that the

general acts shall be printed as herein provided, and delivered to the secretary of state within three days from the receipt of copy by the printer, and that a volume of the general acts shall be printed, bound and delivered to the secretary of the state within forty days from the adjournment of the session of the legislature, provided, that if a recess be taken for a longer time than thirty days, that all of the general acts passed before the recess, shall be immediately printed, bound and delivered collected in pamphlet form.'

"The recess of the Legislature will be taken for a longer time than thirty days and since this section reads **'that all of the general acts passed before the recess, shall be immediately printed, bound and delivered collected in pamphlet form,'** I refer you to Section 2927 of the Code, as amended by the 1932 Acts, page 275, from which you will note 1250 copies shall be printed for distribution to certain state and county officials. Since the Legislature convened on January 10th, there have been copied in this office all the general bills passed, approved by the Governor and delivered to this office, on which we have received pamphlet copies. These general acts already printed in pamphlet form cannot now be collected by the printer in bound form. Additional copies could be run by him to be collected in bound form. We have made no distribution of the acts, awaiting a sufficient number passed to warrant a distribution.

"Please advise how many copies of the pamphlet acts passed and approved by the Governor from January 10th to March 14th, in pursuance of Section 2931 of the Code, shall be collected in bound form and delivered to this office, and to whom they can be sent, whether they shall be retained in this office for the members of the Legislature only, or for others in addition.

"This office will make a distribution of the acts passed from January 10th to March 14th as soon as they are all received from the printer, which will occur in a couple of weeks.

"The officials entitled to these pamphlet acts under Section 2927 of the Code as amended, will have already received these pamphlet acts under the general distribution act."

In answer to your request, I beg to advise that in my opinion, in pursuance of Section 2931 of the Code of 1923, only one copy of the General Acts passed and approved by the Governor from January 10, 1939 to March 14, 1939 should be collected in bound form and delivered to you.

In my opinion Sections 2920 and 2927 have no application on a recess of the Legislature for a period longer than thirty days.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 25, 1939.

Hon. Henry K. Dickinson,
Deputy Solicitor,
Lee County,
Opelika, Alabama.

1. Where a fugitive is brought back from another state to this state to be tried for a felony having waived extradition papers, the sheriff cannot collect the expense of extraditing the fugitive unless there is a conviction.

2. If the sheriff makes application to the governor for the return of a fugitive and the governor grants same, in this instance the sheriff will be entitled to receive his expenses for returning the defendant, whether he be convicted or not.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 24, 1939, in which you request my opinion as follows:

"The Tiger Motor Co. of Auburn sold an automobile to a party here recently, taking a retain title contract for part of the purchase price. The young man skipped out recently and according to information received sold the car in Denver, Col. and proceeded on to Butte, Montana. The Tiger Motor Co. wants the man brought back here for trial and the sheriff wants to know whether or not the state will pay his expenses if he goes out there and gets him. Will you please give me the information?"

I cannot tell from your request whether you have in mind the sheriff going to Butte, Montana and bringing the fugitive back without requisition papers, depending on the defendant waiving the same or not. However, if this is the procedure the sheriff has in mind, then he will have to proceed under the provisions of Section 3742, Code of Alabama, 1923, and he cannot collect the costs of extradition unless the defendant is convicted. This section is as follows:

"Criminal returning to state without requisition; fees of sheriff.—In cases where any sheriff in this state receives notice from the authorities in another state that a party or parties is or are arrested for crime committed in this state, and the sheriff of the county in which said crime was committed goes to the state aforesaid and the party or parties aforesaid consents to return with said sheriff without requisition from the governor, said sheriff shall be entitled to the fees and expenses now provided by law where requisitions issue. But this section shall apply only to felonies and only where conviction of the party or parties is had."

On the other hand, if the sheriff of your county makes application to the Governor for extradition papers in the regular form and the governor

grants the same and the fugitive is returned under the warrant of the Governor on whom requisition is made, then the expenses for returning the fugitive will be paid whether the defendant is convicted or not on the proper presentation of his claim. (Act No. 482, General Acts, 1931, page 559).

A copy of an opinion heretofore rendered by this office to Hon. Haygood Paterson, Sheriff, Montgomery County, on September 3, 1935 is herewith enclosed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 25, 1939.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Corporations, Charter Fees—

Where the authorized capital stock of the corporation is stated to be without nominal or par value, but it is conclusively shown to the satisfaction of the officer with whom the certificate was filed that the shares of stock were of another and different value than $100 per share, the charter fee should be based on the actual value of the shares of stock in view of Section 7012, Code of Alabama, 1923.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your request for opinion dated March 7, 1939, which is as follows:

"My attention has been called to an official opinion rendered to the Hon. B. P. Singleton, State Comptroller, bearing date of January 21, 1939, with reference to the amount of charter fee that should have been collected from the Butane Sales Company, whose charter recites the total capital stock of the corporation shall consist of ten thousand (10,000) shares without nominal or par value. The opinion holds that the charter fees should have been collected on the basis of One Million ($1,000,000) Dollars capital stock in view of Section 7012, Code of Alabama, 1923.

"I am attaching hereto a copy of the articles of incorporation filed by the Butane Sales Company for your examination. I feel sure, had the draftsman of the above referred to opinion had the information set out in said articles of incorporation, he would have reached a different conclusion, as I did, in computing said tax on a basis of Ten Thousand ($10,000) Dollars capital stock.

"Section 7012, Code of Alabama, 1923, reads as follows:

" 'STATEMENT AS TO PAR VALUE OR STOCK.—In any case in which the law requires that the par value of the shares of stock of a corporation be stated in any certificate or paper, it shall be stated in respect of such shares that such shares are without par value, and wherever the amount of stock authorized or issued is required to be stated, the number of shares authorized or issued shall be stated, and it shall also be stated that such shares are without par value. For the purpose of taxes prescribed to be paid on filing of a certificate or other paper relating to corporations, and of franchise taxes, prescribed to be paid by corporations to the State of Alabama, but for no other purpose, such shares shall be taken to be of the value of one hundred dollars per share, **unless it shall be shown to the satisfaction of the officer with whom such certificate should be filed, or the officer with whom such report for assessment of franchise taxes should be filed, that such shares are of another and different value than one hundred dollars per share, in which event such shares shall be taken to be of the par value equivalent to such other or different value as so shown'** (Underscoring mine).

"In view of the foregoing Code section, it is the duty of the Probate Judge to collect a charter fee on a basis of One Hundred ($100.00) Dollars per share, **'unless he is satisfied that such shares are of another and different value than One Hundred ($100.00) Dollars per share.'** In the instant case, however, we need only to refer to the articles of incorporation to determine that a different value than One Hundred ($100) Dollars per share was this value. In other words, within the charter itself we can establish the equivalent of the par value, which is permitted under the above Code section in seeking a proper basis for the collection of the tax in question, without going to other testimony, which, as a matter of fact, was done.

"I invite your attention to the affidavit of W. C. Hughes, the party authorized to receive subscriptions, as to the following subscriptions:

"Name	No. of Shares	Amount	How Payable
Carl C. Hughes	2,500	$2,500.00	Payable in cash
Paul M. Jones	2,000	2,000.00	Payable in cash and service
Dr. S. J. Stallings	1,000	1,000.00	Payable in cash
J. S. Kinney	1,000	1,000.00	Payable in cash
E. R. Hughes	500	500.00	Payable in cash
W. C. Hughes	1,500	1,500.00	Payable in cash and service

"It can be readily seen that each of the above subscribers has pledged $1.00 per share for stock subscribed, and so with an authorized capital stock of Ten Thousand (10,000) shares, it would follow that a Ten Thousand ($10,000.00) corporation was formed.

"Further proof of this fact can be established by an examination of Section 4, subsection B of the articles of incorporation, which states that the amount of capital with which the corporation will begin business

is Two Thousand Five Hundred ($2,500.00) Dollars. If a One Million ($1,000,000.00) Dollar corporation had been formed it would have been necessary to state that the amount of capital with which the corporation will begin business is Two Hundred and Fifty Thousand ($250,000.00) Dollars in order to comply with Section 6965, Sub-section 4, Code of Alabama, 1923, which, as you know, provides that Twenty Five (25) per cent of the authorized capital stock, (and in no case less than One Thousand ($1,000.00) Dollars) must be paid in before a corporation is authorized to do business in the state. As a matter of fact this office took the further precaution to ascertain the fact that a Ten Thousand ($10,000.00) Dollar Corporation was being formed.

"I submit, in view of the foregoing, that the proper basis for the collection of the character fee was Ten Thousand ($10,000.00) Dollars, and not One Million ($1,000,000.00) Dollars, and respectfully request that your office reconsider your former opinion in this matter."

Under date of January 21, 1939, this office rendered an opinion to Hon. B. P. Singleton, State Comptroller, holding that the Judge of Probate is required to collect a charter fee on the authorized capital stock, and not on the amount with which the corporation commenced business. This opinion held further that where the authorized capital stock of a corporation is stated to be without nominal or par value, said stock shall be taken to be of the value of $100. per share, and that under the facts stated, where the authorized capital stock is 10,000 shares without nominal or par value, the charter fee provided by Section 6969, Code of Alabama, 1923, must be charged on $1,000,000.

In your letter you have submitted additional facts which show conclusively that the value on the stock of the corporation in question is $1.00 per share. Therefore, the latter portion of the above referred to opinion is erroneous, and said ruling is hereby amplified to the effect that the charter fee of this corporation should be on $10,000 and not on $1,000,000.

Section 7012, Code of Alabama, 1923, is as follows:

"STATEMENT AS TO PAR VALUE OF STOCK. In any case in which the law requires that the par value of the shares of stock of a corporation be stated in any certificate or paper, it shall be stated in respect of such shares that such shares are without par value, and wherever the amount of stock authorized or issued is required to be stated, the number of shares authorized or issued shall be stated, and it shall also be stated that such shares are without par value. For the purpose of the taxes prescribed to be paid on filing of any certificate or other paper relating to corporations, and of franchise taxes, prescribed to be paid by corporations to the State of Alabama, but for no other purpose, such shares shall be taken to be of the value of one hundred dollars per share, **unless it shall be shown to the satisfaction of the officer with whom such certificate should be filed, or the officer with whom such report for assessment of franchise taxes should be filed, that such shares are of another and different value than one hundred dollars per share, in which event such shares shall be taken to be of the par value equivalent to such other or different value as so shown.**" (Emphasis ours)

Since it was completely shown to the satisfaction of the officer with whom the certificate was filed, that the shares of stock were of another and

different value than $100 per share, by evidence which was not disclosed entirely to us prior to your letter, it is my conclusion that the aforesaid opinion should be altered to conform to the view expressed above. Therefore, it is my opinion that the charter fee levied by your office was correct.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 25, 1939.

Hon. W. D. Partlow, M. D.
Supt. Alabama Insane Hospitals,
Tuscaloosa, Alabama.

Alabama Insane Hospital—Under facts presented, an action of trover for conversion of timber from lands of Alabama Insane Hospital would lie.

Under facts presented, an action of trespass quare clausum fregit would probably lie against J. W. Wells Lumber Company for the unlawful cutting of trees on lands owned by the Alabama Insane Hospital by servant or agent of said Lumber company.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated February 17, 1939, which is as follows:

"The Alabama Insane Hospitals own quite a bit of swamp and overflowed lands in various parts of the State. On forty acres of this land located in Covington County the timber was cut off in 1937 by one Jess Thomas, who states that he cut the timber under contract from the J. W. Wells Lumber Company of Montgomery, Alabama. All the timber cut on the land was delivered to J. W. Wells Lumber Company.

"Please advise us whether the J. W. Wells Lumber Company is liable to the Alabama Insane Hospitals for this timber, either under the theory of conversion of the timber or in a suit for money had and received."

From the facts stated in your letter, I am of the opinion that an action of trover would lie against the J. W. Wells Lumber Company for conversion of the timber which was cut from the forty acres of land owned by the Alabama Insane Hospitals. Also, it seems very probable that an action of trespass quare clausum fregit would lie.

I am unable to say whether an action for money had and received would lie against the said J. W. Wells Lumber Company from the facts stated.

It was held in the case of **Bynum v. Gay,** 161 Ala. 140, 49 So. 757, as follows:

> "The unauthorized cutting and removal of standing trees from the land of another constitutes a conversion for which an action of trover will lie. (White v. Yawkey, 10 So. 360, 108 Ala. 370). While trees standing on land are real estate, they become personal property as soon as they are severed from the soil, but the title thereto remains unchanged, and a wrongful assumption of dominion over them after severance constitutes a conversion."

In the case presented by you, I presume that the timber cut by Jess Thomas for the J. W. Wells Lumber Company was turned over to the said J. W. Wells Lumber Company and the assumption of dominion over the timber by the said lumber company would constitute a conversion for which an action of trover could be maintained. Even if the said Jess Thomas was not an agent or servant of the said J. W. Wells Lumber Company but had sold the timber to the said J. W. Wells Lumber Company and it in turn took possession all presumtively for its own benefit; then this assumption of dominion over it by J. W. Wells Lumber Company was wrongful, and, in and of itself, amounted to and was a conversion, for which an action of trover would lie against the J. W. Wells Lumber Company. **Yellow Pine Lumber Co. v. Alabama State Land Company,** 171 Ala. 77, 54 So. 608.

A prerequisite, however, to maintain an action of trover against the J. W. Wells Lumber Company is that the Alabama Insane Hospitals must have had at the time of the conversion a concurrence of the right of property, general or special, with an immediate right of possession. **Granade v. United States Lumber & Cotton Co.,** 224 Ala. 185, 139 So. 409; **Pinckard v. Cassell,** 195 Ala. 353, 70 So. 153; **Long v. Nadawah Lumber Co.** 202 Ala. 523, 81 So. 25; **Holman v. Ketchum,** 153 Ala. 360, 45 So. 206. If it should be that the Alabama Insane Hospitals was not at the time in possession of the lands from whence the timber was cut, or had not at such time the immediate right of possession to such land and timber right, then an action of trover would fail. If, however, the prerequisites to the right to maintain an action of trover existed in favor of the Alabama Insane Hospitals at the time of the conversion, then I am of the opinion an action of trover would lie against the J. W. Wells Lumber Company.

From the facts stated in your letter, I am of the opinion that an action of trespass quare clausum fregit would lie against the J. W. Wells Lumber Company. It was held in the case of Trognitz, v. Fry et als., 215 Ala. 609, 112 So. 156, as follows:

> "Without question one may commit a trespass through another as his active agent or joint participant, although the one may not be present at the time, taking any personal hand in the trespass. He must be directing aiding, participating in, or must ratify the trespass."

It was also held in Trognitz v. Fry et als., supra, that a servant engaged in a lawful employment for his master, but while acting within the scope of his employment, in the conduct of his master's business, wrongfully trespasses upon the property of another, renders the master liable for consequential damages under the doctrine of respondeat superior.

Therefore, if further investigation of this matter should disclose that Jess Thomas was a servant of the J. W. Wells Lumber Company at the time the lumber was cut or an agent which the said lumber company was directing or aiding in the cutting of said timber or subsequently ratified his actions, then under **Trognitz v. Fry et als., supra,** the said J. W. Wells Lumber Company would be liable.

However, before an action of trespass would lie against the J. W. Wells Lumber Company, it would be necessary to prove that the Alabama Insane Hospitals was in possession, actual or constructive, of the said lands at the time of the commission of the trespass. **Buck v. Louisville & Nashville R. R. Co.,** 159 Ala. 305, 48 So. 699; **Lee, et al. v. Raiford,** 171 Ala. 124, 54 So. 124.

The measure of damage in an action of trespass would be the difference between value of land immediately before and immediately after the trespass. **Granade v. U. S. Lumber & Cotton Co.,** 224 Ala. 185, 139 So. 409; **Fed. Land Bank of New Orleans v. Davis,** 228 Ala. 85, 152 So. 226; **White v. Yawkey,** 108 Ala. 270, 19 So. 360.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 25, 1939.

Hon. T. M. Perry, President,
Marengo County Board of Revenue,
Linden, Alabama.

The Board of Revenue of Marengo County has authority to pay for long distance telephone calls made by the Sheriff, when they are on official business for his office.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion, under date of March 17, 1939, which is as follows:

"Please give me your opinion as to whether or not the Board of Revenue of Marengo County is authorized to pay for long distance telephone calls by the sheriff if such calls pertain to official business of the sheriff's office."

It is my opinion that your inquiry should be answered in the affirmative.

On October 26, 1931, this office rendered as opinion to Hon. W. C. Beebe, Attorney, Bay Minette, Alabama (Biennial Report of Attorney General, 1930-32, page 515), holding that a Board of Revenue had authority to pay for official telephone calls made by a Sheriff when they pertained to official business connected with his office. In that opinion the following statement was made:

"The Commissioners' Court should scrutinize all such claims and be convinced that such calls were concerned purely with the official duties of the officer and were necessary and should never be allowed unless itemized statement is filed with the Commissioners' Court, showing the dates of such calls, from whom and to whom and the amount."

On March 16, 1937, this office in an opinion to Hon. Saxon P. Poyner, Judge of Probate, Houston County, Dothan, Alabama (Quarterly Report of Attorney General, Vol. VI, page 125), held that a Board of Revenue was authorized to pay for official telephone calls made by a Circuit Solicitor.

It will be observed that the Board of Revenue should be careful to see that the privilege of making calls is not abused.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 25, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Stationery — Local Act creating office of County Solicitor of Cullman County.

County Solicitor: Commissioners' Court of Cullman County not authorized to pay for stationery for County Solicitor where local act creating County Solicitor provided in its title for the furnishing of stationery to County Solicitor but body of Act fails to make provision for same.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion of February 24, 1939, which is as follows:

"Please refer to Local Acts 1935, page 196, creating office of County Solicitor of Cullman County, and advise me as follows:

"1. Would the fact that the word stationery inserted in the caption of such Act and omitted in the body of such Act, prohibit the County Governing Body paying for stationery for such Solicitor?"

I answer your inquiry in the affirmative.

The title of an Act is a part of the Act, made so by the provisions of Section 45 of the Constitution. **Jones v. Stokes,** 179 Ala. 579, 60 So. 280; **Wages v. State,** 225 Ala. 2, 141 So. 707. However, it has been held that the title cannot extend or restrain the positive language of the body of the statute unless the meaning is doubtful and then and under those circumstances only, can the title be considered. 59 **C. J.,** page 1007, **Jones v. Stokes,** supra, **Wages v. State,** supra, **State ex rel. City of Mobile v. Board of Revenue, etc.** 202 Ala. 303, 80 So. 368.

In the case of **State ex rel. City of Mobile, v. Board of Revenue,** etc. supra, the court had the following to say:

> "While the title to an act cannot serve to institute a contradiction of plain terms in the enacting clauses of an act, yet the recitals of the title are available aids to the removal of ambiguity or uncertainty in the enacting clauses of an act. Bartlett v. Morris, 9 Port. 266, 270; Blakeney, 6 Port. 109, 30 Am. Dec. 574; Jones v. Stokes, supra. In cases of doubt in respect to an ambiguous legislative context, the preamble of an act must be resorted to to ascertain the intent and to resolve the doubt. 36 Cyc. pp. 1132, 1133; Price v. Forrest, 173 U. S. 410, 426-428, 19 S. Ct. 434, 43 L. Ed. 749."

The language used in Section 6 of Act No. 321, Local Acts, 1935, is plain and unambiguous. It clearly sets out what the County Solicitor shall be furnished by the Commissioners' Court of Cullman County and stationery is not included in the list. Although stationery is provided for in the title of the bill, I am of the opinion that under the authorities heretofore cited that the title cannot be considered to determine whether the County could legally furnish stationery to the county solicitor as the language of the act is clear, unambiguous and in no way doubtful. The language employed in section six of the act is plain and in construing the same we can only learn what the legislature intended from what they said. It is their's to command, ours to obey. We are estopped from looking to the title of the Act and, therefore, the language of the Act must govern.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 28, 1939.

Hon. J. J. Whiddon,
Member, Board of Revenue,
Houston County,
Dothan, Alabama.

Counties — Department of Finance — Statutes —

Department of Finance Bill of 1939 (approved March 7, 1939) supersedes local acts relative to county purchases in so far as same are conflicting. Counties may make purchases through Department of Finance, even though local acts provide specific modes for making county purchases.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of March 14, 1939, which is as follows:

"Kindly refer to Local Acts of 1935, page 253, Section 7, and note that we operate our Road Department purchases by having to give notice by publication for twenty days prior to the purchase and to receive bids and to buy whatever the invitation calls for from the 'lowest responsible bidder.'

"Please let me have your opinion with reference to the following:

"1st. How will this Local Act under which we have been operating be affected by the recently enacted Finance Bill in which provisions have been made for Counties to make purchases through the agency set up by the Legislature.

"2nd. Does the recently enacted Finance Bill, insofar as Section 7 of the Local Acts is concerned, abolish same; or

"3rd. Does the Finance Act simply provide an additional method, or ways and means, to make said purchases.

"4th. Can this County operating under said Local Acts legally make purchases through the Finance Department of the State without complying with the provisions of the Local Acts by advertising, receiving bids, etc.

"5th. If the Board of Revenue can purchase through the State Finance Department without referring to the provisions of the local bill, can it use its discretion as to which article to buy, quality considered, and without regard to lowest price.

"We are very anxious at this time to make a purchase of a road machine, which is badly needed on our County roads. We have had various bids by advertising for same and have had prices through the Finance Department, which were cheaper, and which would save the County money, and which machines would be more desirable to the Road foreman, but which was still not as cheap as some of the machines offered, but which are not at all desirable by the Road Foreman or the members of the Board of Revenue."

Section 7 of Act No. 438, H. 1014, approved September 15, 1935, (Local Acts 1935, page 253) to which you refer, provides as follows:

"Section 7. That no purchase or contract to purchase any road or bridge material, team, tools, machinery, supplies or equipment shall be made, or any contract for the construction, maintenance or repair of any road let, either by Board of Revenue or Road and Bridge Foreman, if the amount involved, or the value thereof, exceeds $25.00, except to the lowest responsible bidder, and where the amount of purchase or con-

tract to be let, is in excess of $25.00 and not greater than $200.00, the Board of Revenue shall have posted a notice on the Bulletin Board in front of the Courthouse of Houston County five days prior to the meeting at which said purchase is to be made, and if amount of purchase to be made or contract to be let be in excess of $200.00 notice must be given that bids will be received for such purchase or contract by advertising same for a period of twenty days, by publication for once a week for two consecutive weeks in a newspaper published in Houston County. And in addition to the above notice or notices, if amount be in excess of $200.00 the chairman of said Board of Revenue shall give written notice by registered mail with return receipt requested of such contemplated purchase or purchases, to at least three merchants or dealers in the goods or materials to be purchased, and like notice of any contract to let, to at least three contractors engaged in the work contemplated. Such notice or notices, together with return receipts, must be recorded in and become a part of the minutes of the Board of Revenue of Houston County. Provided, however, in case of emergency, for the purchase of machinery parts no advertisements shall be required as above stipulated. Any and all contracts made and entered into or purchases made by the Board of Revenue, except for purchases of emergency machinery parts in violation of terms of this Section shall be null and void, and it shall be unlawful for the Probate Judge to issue warrants in payment of same."

The pertinent parts of Act No. 112, H. 72, approved March 7, 1939, known as the "Department of Finance Act of 1939," are as follows:

"Section 5. FUNCTIONS AND DUTIES OF THE DEPARTMENT OF FINANCE. The general functions and duties of the Department of Finance shall be as follows: * * * (14) To require the periodic reporting of all purchases of furniture, fixtures, supplies, material, equipment and other personal property, except printing, and all contracts and leases for the use or acquisition thereof by or for counties, the purchase, contract, or lease price of which is $100 or more, and to require information in connection therewith, to prescribe forms and fix the time for submitting such reports, **and, when requested by any county, municipal corporation, political sub-division and other local public body (including any board of education) to make such purchases, contracts or leases for it.** It shall be the duty of every county to make such report on forms furnished by the Department of Finance, whenever requested so to do, but not more than every thirty days." (Italics supplied).

"Section 23. THE DIVISION OF PURCHASES AND STORES; THE PURCHASING AGENT. There is hereby established in the Department of Finance the Division of Purchases and Stores, which shall be headed by and under the direction, supervision and control of an officer, who shall be designated the Purchasing Agent, to be appointed by the Director of Finance, with the approval of the Governor. The functions and duties of the Division of Purchases and Stores shall be as follows: * * * (2) To perform the functions and duties of the Department of Finance with respect to purchases and contracts and leases for the acquisition or use of any personal property by or for the counties, municipal corporations, political subdivisions and local public bodies in the State, including the preparation of forms for the reports required of the counties and the receipt and examination of such reports."

"Section 33. REPEAL OF CONFLICTING LAWS. All laws or parts thereof in conflict with any provision of this Act are hereby repealed to the extent of such conflict."

Your inquiries present the proposition as to the effect of the Department of Finance Act of 1939, a general act, on Section 7 of the local act of 1935, page 253, supra.

By the adoption of the Department of Finance Act of 1935, the legislature, in my judgment, clearly intended to establish a uniform system throughout the State of allowing counties an alternative mode of making purchases. The bill gave all the counties of the State the option to purchase through the Department of Finance. Any provisions of local acts to the contrary were, in my opinion, superseded or modified to this extent. See 59 Corpus Juris 1056; Shepherd v. Clements, 224 Ala. 1, 141 So. 255; Ex parte Central Coal & Iron Co., 209 Ala. 22, 95 So. 472; Levy, Aranson and White v. Jones, 208 Ala. 104, 93 So. 733. The 1939 act is cumulative of the local act, and both should be construed in pari materia.

It follows that the local act in question is superseded or modified only in so far as it conflicts with the 1939 Act. In other words, if the county desires to avail itself of the right to make purchases through the Department of Finance it may do so. The requirements of Section 7 of the local act are superseded or modified to this extent. However, if the county does not desire to make purchases through the Department of Finance, the provisions of the local act are applicable to its purchases. This leaves two alternative methods of making purchases for the county, viz. (1) through the Department of Finance without regard to the requirements of the local act, and (2) in accordance with the terms of the local act in question. The county governing body may use its discretion as to which articles it may purchase through either method. However, in exercising this discretion, the method of purchasing should be adopted which would be to the best interests of the county.

The above answers all of your inquiries, although not in the specific order in which they were asked.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 29, 1939.

Hon. J. F. Koonce,
License Inspector,
Lauderdale & Colbert Counties,
Florence, Alabama.

Person operating an "electrical repair shop" on a closed truck is liable for license prescribed by Schedule 56 of Revenue Act of 1935.

Whether or not a particular operation constitutes the operation of an electrical repair shop is one of fact. This opinion distinguished from the opinion rendered to Judge Grady R. Williams, Judge of Probate, Lauderdale County, on February 4, 1939.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

This is to acknowledge receipt of your letter of February 27, 1939, which is as follows:

"Mr. A. S. Call of Florence, Alabama, operates an electrical repair shop on his closed truck, from house to house and does a good business and has for years. Mr. Jack Terrell, State field man, cited him under Schedule 56, December, 1938. He declines to pay — says he is not liable for license. Will appreciate your opinion."

Prior to the receipt of your letter, this office received a letter from Hon. Grady R. Williams, Judge of Probate of Lauderdale County, which letter is as follows:

"Will you kindly advise me whether Mr. A. S. Call should be required to pay a license under Schedule 56 of the General Revenue Act of 1935.

"Mr. Call does not have or maintain a shop, or other place of business. He does not carry on hand any stock of supplies. He maintains a telephone in his residence and owns a truck on which are printed the words:

"'A. S. Call, Frigidair Service. Telephone No. 315.'

"He uses the truck to haul his tools from his home to wherever he may be called to repair an electric refrigerator. He sells nothing but his services but, the repair on which he is called requires some new part, then he purchases such new part for the owner of the refrigerator."

On February 4, 1939, in answer to Judge Williams' request, we rendered an opinion holding that Mr. Call was not liable for a license under Schedule 56 of the General Revenue Act of 1935. A copy of this opinion is herewith enclosed. The conclusion there reached was based on the facts set out in Judge Williams' letter.

The question as to whether or not an individual is operating a shop is one of fact. In Judge Williams' letter he used this language: "Mr. Call does not have or maintain a shop." This statement naturally required the answer which we gave in our opinion of February 4th. In your letter of February 27th you used the following language: "Mr. A. S. Call of Florence, Alabama, operates an electrical repair shop in his closed truck."

If your statement is correct, then Judge Williams' statement is partially incorrect and Mr. Call would be liable for a license. It is my opinion that an electrical repair shop can be operated on a truck as well as in a building,

but whether or not such a shop is operated on a truck, as I have said before, is a question of fact which must be determined by you.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 29, 1939.

Dr. Walter B. Jones,
Commissioner, Game, Fish & Seafoods,
Montgomery, Alabama.

Section 23 of Act No. 240, General Acts of Alabama, 1935, page 637 is constitutional.

Section 22 of the Alabama Game, Fish & Fur Regulation, proclaimed, promulgated and approved, July 21, 1938, prohibiting the sale of game fish in the State of Alabama, regardless of where taken, is constitutional and has the force and effect of law.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated March 13, 1939, which is as follows:

"Please advise me as to the constitutionality of Section 23 of an Act of the Legislature approved August 12, 1935 (Game and Fish Laws 1935-1936, page 15), and whether or not a Regulation prohibiting the sale of game fish in the State of Alabama, regardless of where taken, shall have the force and effect of law."

In reply to your inquiry, I am of the opinion that Section 23 of Act 240, General Acts of Alabama, 1935, page 637, is constitutional.

Section 23 of the Act reads:

"23. The Commissioner, with the approval of the Conservation Board, is hereby authorized to make and promulgate such reasonable rules and regulations, not in conflict with the provisions of the game and fish laws, as he may deem for the best interest of the conservation, protection and propagation of wild game, birds, animals, fish and seafoods, which rules and regulations shall have the force and effect of law; provided, however, that the Commissioner shall not have the right to make or promulgate any rule or regulation which will hamper industry, or which will interfere with the operation of any industrial plant or plants, or industrial operation, or operations."

The question which would probably be raised as to the constitutionality of the above-quoted section of said Act, is that the same is invalid because it transfers legislative powers to the Commissioner of game, fish and seafoods. However, in my opinion, such a contention would not be well founded. In the case of **State v. McCarty**, 5 Ala. App. 219, the court in discussing and considering the powers of the legislature to confer upon instrumentalities and agencies of the State the authority to pass reasonable rules nad regulations necessary to carry out the objects of their organization, had this to say:

"While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the Legislature, in view of the great public interest confided to them have always received from the courts a liberal construction; and the right of the Legislature to confer upon them the power to make reasonable rules, by-laws, and regulations is generally recognized by the authorities.

"While a legislative body cannot delegate its legislative power to make a law, it may delegate the power to an arm of the government to make and enforce regulations for the execution of a statute according to its terms. — Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 357, 51 L. Ed. 523; St. Louis Merchants' Bridge Terminal Co. v. U. S. 188 Fed. 191, 110, C. C. A. 63."

In further reference to this subject the court said:

"To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known by a lawmaking power and need, therefore, be a subject of inquiry and determination outside of the halls of legislation." Locke's App. 72 Pa. 491, 13 Am. Rep. 716.

The Supreme Court of Alabama, in the late case of **Skrmetta v. Alabama Oyster Commission**, 168 So. 168, in passing on the constitutionality of an Act empowering the Alabama Oyster Commission to exercise regulative powers to preserve oyster life and make other regulations necessary to carry out the object of said Commission, speaking through Mr. Justice Bouldin, said:

"The logic of appellant's position is that general regulative powers to accomplish defined purposes cannot be granted, (a state agency) but the Legislature must inform itself and specify the particular lines of regulation to be followed. This is out of line with decisions, here and elsewhere, upholding regulatory powers conferred in general terms, for well-defined purposes named in the law. The entire subject-matter here involved concerns the conservation of state properties through a state agency, protection of a source of food supply, owned by the state, and the oyster industry growing out of same. We conclude the regulation challenged was and is valid. State v. McCarty, 5 Ala. App. 212, 59 So. 543; Ingram v. State, 39 Ala. 247, 84 Am. Dec. 782; Wheeler v. River Falls Power Co., 215 Ala. 655, 111 So. 907; Parke et al. v. Bradley, State Treasurer, 204 Ala. 455, 86 So. 28; Ferguson v. Starkey, 192 Ala. 471, 68 So. 348; Curlee v. State, 16 Ala. App. 62, 75 So. 268; Hill et al. v. Moody, Probate Judge, et al., 207 Ala. 325, 93 So. 422; Hard. State Comptroller, v. State ex rel. Baker, 228 Ala. 517, 154 So. 77."

Therefore, under the authorities heretofore cited, I am of the opinion that the Legislature of Alabama had the power to delegate to the Commissioner of Conservation of game, fish and seafoods the authority to make and promulgate such reasonable rules and regulations as provided for in Section 23 of said Act, supra, and that said section is constitutional.

You next ask whether or not a regulation prohibiting the sale of game fish in the State of Alabama, regardless of where taken, shall have the force and effect of law. I call your attention to Section 22 of the Alabama Game, Fish & Fur Regulations, proclaimed, promulgated and approved by I. T. Quinn, Commissioner of Conservation, on the 21st day of July, 1938. Said Section 22 provides such a regulation. It is my opinion that under the powers conferred upon the Commissioner of game, fish and seafoods by the legislature in Section 23 of Act No. 240, General Acts of Alabama, 1935, page 637, that said Commissioner had authority with the approval of the Conservation Board, to make and put into effect said regulation and the same has the force and effect of law. There is no question that a state has an inherent right to regulate and protect its natural resources and that a statute or regulation regarding the selling of game fish taken in Alabama would be constitutional. Our Supreme Court in the case of **Skrmetta v. Alabama Oyster Commission,** supra, in discussing the rights of the State of Alabama in her natural resources such as fish and oysters quoted the following excerpt from the case of **Smith v. State of Maryland,** 18 How. 71, 15 L. Ed. 269:

> " 'But this soil is held by the state not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish. The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable or destroy it altogether. This power results from the ownership of the soil from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held.' " 95 Ala. 176, 182, 10 So. 752, 753, 15 L. R. A. 761, 36 Am. St. Rep. 195.

Although the state or agency of the state could pass a statute or regulation prohibiting the selling of game fish taken in Alabama (See H. B. 361, approved March 18, 1933), the question then arises as to whether a regulation prohibiting the selling of game fish in Alabama, regardless of where taken, would be unconstitutional as an interference with foreign or interstate commerce. It seems not. The authorities are in general accord that such a regulation is not unconstitutional on the theory that wild game belongs to the State in its sovereign capacity in trust for the whole public and that any right of property acquired therein by capture and possession is a qualified right only and subject to all reasonable limitations imposed for the protection and preservation of such game. It is generally held that statutes or regulations regarding the possession, transportation or sale within the State of fish or game taken outside of the State are a valid exercise of the police powers and not unconstitutional as an interference with foreign or interstate commerce.

The following statement is found in 11 Am. Jur., Section 99, page 89:

"It is generally held that statutes or regulations regarding the possession, transportation, or sale within the State of fish or game taken outside of the State are a valid exercise of the police powers and not unconstitutional as an interference with foreign or interstate commerce." New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. Ed. 75, 92 A. L. R. 1264; 11 Am. Jur. 89 (Sec. 99); 92 A. L. R. 1267; 12 C. J. 61.

In the case of **People v. Booth Fisheries Co.**, 97 N. E. 837, which case is on all-fours with the proposition before us, the court, in referring to the case of **Silz v. Hesterberg**, 211 U. S. 31, which is referred to as the final authority on the subject, said:

"The rule was applied, which has been repeatedly held, that laws passed by a state in the exercise of the police power, not in conflict with laws of Congress on the same subject and indirectly or remotely affecting interstate commerce, are nevertheless valid laws. It was said that the purpose of the law was not to regulate interstate commerce, but, by laws applicable alike to foreign and domestic game, to protect the people of the state in the right to use and enjoy the game of the state. While these provisions may incidentally affect the right of one importing game to hold and dispose of it in the closed season, the effect is only incidental."

It is, however, pointed out in the case of **People v. Booth Fisheries Co.**, supra, as follows:

"A state has no power to wholly exclude a lawful article of commerce produced in another state or country. While it may regulate the introduction of an article, including a food product, so as to insure its purity, the police power does not extend to its total exclusion." Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49.

However, the court in the case of **People v. Booth Fisheries Co.**, supra, was construing the constitutionality of a statute which is similar and analogous to the regulation herein considered. The court was of the opinion that although a state cannot by statute or regulation wholly exclude a lawful article of commerce produced in another state or country, yet the fish, there under consideration, were subject to the laws prevailing in the state after their arrival within the state. It was held the fish could lawfully be possessed for one's own consumption or to give away or store but could not be sold as the statute prohibited the sale of the same. Therefore, under the authorities heretofore presented, I am of the opinion that the regulation prohibiting the sale of game fish in Alabama, regardless of where taken is constitutional and is not violative of the commerce clause of the Constitution of the United States. However, under such a regulation, it would not be unlawful for one to possess game fish shipped in from another state for his own consumption or to give away or store.

I call your attention to the fact that the Department of Conservation of Game, Fish and Seafoods which was created by an Act No. 240, General Acts of Alabama, 1935, at page 632, was abolished by an Act, No. 52, approved March 14, 1939, and the said Department of Conservation of Game, Fish and Sea food was placed under the Department of Conservation which was created by the said Act No. 52, approved March 14, 1939. However, Sections 4 and 7 of the Act, creating the Department of Conservation provides for

the transfer of all the functions, duties, powers and authority of the Department of Conservation of Game, Fish and Seafoods to the Department of Conservation and also provides for the transfer of all functions, duties, powers and authority of any officers or employees of said Department of Conservation of Game, Fish and Seafoods to the Director of Conservation. Therefore, the Director of Conservation would, in my opinion, have the same rights and powers as given the Commissioner of the Department of Conservation of Game, Fish and Seafoods, and this opinion would be equally applicable to his position and department.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 29, 1939.

Hon. Hunter Phillips,
Tax Assessor,
Choctaw County,
Butler, Alabama.

Tax Assessors — Compensation for making assessment book — Compensation provided for making assessment book required under Section 58, 1935 Revenue Code, held to be based upon amount of taxable property in the county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of February 6, 1939, in which you request my opinion as follows:

"Under Section 58, of the 1935 Revenue Code, I am required to make an abstract book. In this book I am required to list each tax payer's name with the value of his property and the taxes that are due on same. In making this book we are required to list each tax payer's name even though all of his property might be exempt taxes. We are paid for making this book on a basis of the assessed valuation in the County, and my contention is that the exempt property is a part of the assessed valuation, with reference to this section of the Code, because we have to assess the part of the property that is exempt of taxes just as if it were taxable. However, I am being paid for the making of this book on a basis of the taxable valuation in the County. Please advise me if the exempt property should not be used when arriving at the amount to be paid for the making of this book."

In reply, I wish to advise you that in my opinion the exempt property referred to by you in your request should not be considered in order to properly arrive at the amount to be paid for making the book in question.

You refer to the book made in accordance with the requirements of Section 58 of the Revenue Code of 1935, (General Acts 1935, page 286) which provides as follows:

"Section 58. After the book of assessments has been completed as herein provided, the Tax Assessor must enter in a book in concise form, the amount of taxes assessed against each taxpayer, showing separately the amount of taxes on real estate and personal property and other subjects of taxation, and the total amount of tax due, and the address of the taxpayer and the fees of the assessor with a blank for the fees of the collector, and such book he must turn over to the tax collector on or before the fifteenth day of September. For the services rendered by him in preparing such book he shall receive compensation to be allowed by the Court of County Commissioners, Board of Revenue, or other governing body of like jurisdiction as follows, viz.: In counties where the aggregate assessed value of real and personal property amounts to two million dollars ($2,000,000.00) or less, one hundred dollars ($100.00); when the assessed value amounts to more than two million ($2,000,000.00) and not exceeding four million dollars ($4,000,000.00), one hundred and twenty-five dollars ($125.00); when the assessed values amount to more than four million dollars ($4,000,000.00) and not exceeding six million dollars ($6,000,000.00) one hundred and seventy-five dollars ($175.00); when the assessed values amount to more than six million ($6,000,000.00) and not exceeding eight million dollars ($8,000,000.00) two hundred dollars ($200.00); when the assessed values amount to more than eight million dollars ($8,000,000.00) such compensation as may be fixed by the Court of County Commissioners, Board of Revenue or other governing body, not less than two hundred and fifty dollars ($250.00); and not exceeding six hundred dollars ($600.00); but any assessor who fails to complete such abstract by the time required shall forfeit all right to compensation."

You will note that the Legislature in fixing both the amount and the method of arriving at the amount of compensation to be allowed for the services here required, used the words "aggregate assessed value of real and personal property." I call your particular attention to the use of the words "assessed value." The word "value" is defined by Article I, Section 1 of the Revenue Laws of 1935, as follows:

"(i) The term 'value' means the fair and reasonable market value of the **taxable** property, and shall be estimated at the price at which the property would bring at a fair voluntary sale." (Emphasis supplied).

In my judgment, the term "aggregate value" as used in Section 58 of the Revenue Law of 1935, supra, contemplates the aggregate value of real and personal property upon which tax may be collected. It is my opinion, therefore, that you should be paid for making this book on the basis of the property, in the county, upon which tax is payable.

I refer you to the case of **Crow, Tax Collector v. General Cable Corporation,** 137 So. 657, 223 Ala. 611.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 29, 1939.

Hon. O. C. Maner,
Clerk, Court of Common Pleas,
Montgomery County,
Montgomery, Alabama.

Ex post facto — Court of Common Pleas, Montgomery County.

Any statute enacted after the commission of an offense, which increases the costs to be adjudged on conviction, necessarily increases the punishment on payment, and when applied to past offenses, is ex post facto.

Act creating Court of Common Pleas of Montgomery County does not increase amount of costs.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of March 10, 1939, in which you request my opinion as follows:

"The law under which this Court was operating was repealed by a law signed by the Governor Wednesday, March 8, 1939. A new local law was also signed by the Governor on the same day, and we are now operating under the last law.

"I would appreciate an opinion from you as to what costs should be charged in criminal cases which were transferred from the old court to the new court. Should I charge the same fees provided for under the old law, or should I charge the fees provided under the new law?"

The question to be decided in your request is whether or not the application of the new schedule of costs would constitute an ex post facto law which is specifically prohibited by Section 22 or Article I of the Constitution of 1901.

Section 10 of the Act provides that all cases pending in the former court are to be transferred to the new court created by such Act. As to the costs in the civil cases terminating after the passage of the Act, I refer you to 15 Corpus Juris 23, where it is said:

"Although there is some authority to the contrary, the right to costs and the amount and items taxable are as a general rule governed by the statutes in force at the time of the termination of the action and not by those in force at its commencement as the question of costs is one which is solely of statutory regulation and wholly dependent on it, and as 'alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be'."

Clearly, then, as regards costs in civil cases, the provisions of the new Act will govern cases terminated or brought to a close since its passage.

We now come to the question of the costs in the criminal cases. The objection to the use of the new Act on cases where the commission of the offense was prior to the effective date of the new act, is naturally that such a law is ex post facto. The objections to an act which will render it ex post facto are: (we might say the requirements of an ex post facto act are:) that it be one which imposes a punishment for an act which was not punishable when it was committed, imposes additional punishment, or changes the rules of evidence by which less or different testimony is sufficient to convict, and, of course, a criminal case.

By Section 22 of Article I, ex post facto laws are expressly prohibited. Therefore, we have only to ascertain whether or not the imposition of the terms concerning costs of the new Act (No. 168 Legislature 1939) will bring the case within the ex post facto class. Now if the new costs provided for in the new act are in excess of the costs provided for in the old act, then its application to cases arising under the old act and terminating under the new will be ex post facto and null and void. It is a generally accepted rule that "any statute enacted after the commission of an offense, which increases the costs to be adjudged on conviction necessarily increases the punishment and when applied to past offenses is ex post facto." See **Caldwell v. State,** 55 Ala. 133.

However, if the subsequently enacted statute reduces the costs to be paid on conviction, this is held **not** to be ex post facto since it does not come within the requirements set out above.

Therefore, the only objection to applying the new act to all cases in toto, cost regulations and all, would be that it would be increasing the costs to be paid on conviction.

From a consideration of all the applicable sections of the new act recreating the court, I am of the opinion that there would be no **increase** in the costs by the application of the new act. (See Vol. XI, Quarterly Report of Attorney General, page 131, for discussion of costs and fees of Common Pleas Court under old Act).

Unless, then, there are certain other applicable features of the old Act which would increase the costs by applying the provisions of the new Act, I am of the opinion that it is meet and right, in fact mandatory, that the schedule of fees provided in the new Act be applied to cases terminating subsequent to its passage even though instituted prior thereto.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 29, 1939.

Mrs. Pauline H. Teague,
Clerk, Circuit Court,
St. Clair County,
Ashville, Alabama.

Sheriff in office at time service rendered held entitled to fees for service of scire facias forwarded to sheriff of county in which

defendants resided for service by sheriff there, though return was made by sheriff of such county after sheriff forwarding scire facias left office.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 15, 1939, in which you request my opinion as follows:

"Kindly give me your official opinion on the following:

"On **Dec. 23rd, 1938,** Sci. Fa. to defaulting defendant and bail was in the hands of the sheriff of this county for service. The defendants residing in another county, the sheriff here, placed the papers on his proper dockets and forwarded the Sci Fa. to the county in which the defendants resided, for service by the Sheriff there. On **January 25, 1939,** these papers were served and returned to the new sheriff of this county. Kindly advise me which sheriff would be entitled to the fees accrued in such a case, the sheriff who first handled the papers and made the proper effort to have them served, or the new sheriff, who came in office on **January 16th, 1939,** and received them on their return? (Disregard sheriff who served same.)"

In my opinion, the sheriff who was in office on December 23, 1938, and who forwarded the scire facias to the county in which the defendants resided for service by the sheriff there would be entitled to the fees provided by Section 7287 of the Code of Alabama, 1923, for such service.

This office has heretofore held that the sheriff is entitled in such cases to the fee found under the schedule of fees set forth in Section 7287. Even though the same deals with fees in civil cases for the reason that, while the forfeiture has grown out of a criminal process, as soon as conviction is had or judgment or confession or a forfeiture is taken, the enforcement of such judgment, confession or forfeiture becomes a civil matter and the collection of the same is, likewise, a civil procedure and "the fees in such matters are regulated by the law pertaining to civil procedure." Opinion of Attorney General, Biennial Report, 1930-32, page 243.

Section 7287 sets forth the fee of $1.50 for "serving scire facias, or notice in the nature thereof and returning the same." The fee allowed is for a service rendered regardless of the time. It appears from your inquiry that the sheriff in office on December 23, 1938, rendered the service for which the fee was contemplated and, therefore, he should receive the same. The fact that he has subsequently gone out of office would not mitigate against his right to such fees.

The foregoing conclusions are in accord with opinions heretofore rendered by this office. See opinion to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, dated January 28, 1939, holding land agents entitled to percentage on moneys received from redemptions of property that had been purchased by state at tax sale where the redemptions were secured through their efforts, regardless of the time when the moneys were actually

paid or collected before or after the contract which the agent held with the State Land Commissioner had terminated, and numerous opinions cited therein to the same conclusion.

The Supreme Court of Texas in **Knight v. Harper**, 279 S. W. 589, 591, reached a similar conclusion, stating:

> "We know of no statute which would authorize an incoming public officer to claim any part of fees accruing to the office prior to his incumbency, which were collected by his predecessor, prior to such incumbency, for services rendered by the predecessor. Nor do we know of any good reason why an incoming officer should be allowed any part of such fees.
>
> " 'Where there are no relations to the office there can be no duties and no claim for services.' Graves v. Bullen, 53 Tex. Civ. App. 261, 115 S. W. 1177."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 29, 1939.

Hon. J. S. Benson,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

License tags — Motor vehicles —

1. Schedule 158.1 as amended by General Acts, 1936-37, page 86, applicable to new and used automobiles.

2. License tags for trucks may be bought on monthly declining basis.

3. Schedule 158.13 not rendered inoperative for all purposes by Schedule 158.1 as amended.

4. Party possessed of an automobile on or prior to November 15th, being operated or not, held not entitled to license on Monthly declining basis.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 25, 1939, in which you request my opinion as follows:

"I will greatly appreciate your usual promptness in rendering me an opinion on the following which is causing me a great deal of annoyance by not being positive on the point.

"Under Schedule 158.1, amended 1936-37, Ex. Sess, it seems to be plain that all automobiles acquired on or after Nov. 15th, tags can be bought for the then remaining months; however in an opinion of Attorney General in Vol. 1, page 134, it seems that only new automobiles apply to this schedule. The whole thing seems to be contradictory, and I will certainly appreciate you clarifying this for me.

"Let me know what cars and trucks can be bought on a monthly declining basis, and if the law of selling 'half-tags' plus $1.00 is still in effect, and when must a car be bought for this to apply."

In answer to your first inquiry, i. e., whether or not under Schedule 158.1 as amended by General Acts, 1936-37, page 86, new and used automobiles may be acquired on a monthly declining basis, you are advised that this office has ruled in an opinion dated February 19, 1938, to Hon. Wm. W. Hill, Probate Judge, Montgomery County (Quarterly Report of Attorney General, Vol. X, page 98) that the monthly declining basis is applicable to new and used automobiles. The opinion to which you refer found in Quarterly Report of Attorney General, Vol. I, page 134, was, as you will note, rendered prior to the passage of the amendatory act.

You are also advised that this office has written to the question regarding the buying of truck license on a monthly declining basis. In opinions found in Quarterly Report of Attorney General, Vol. X, pp. 77 and 139, the conclusion was reached that a monthly declining basis is specifically provided for motor trucks by Schedule 158.5 as amended by the laws of 1936-37 at page 108.

Replying to your third inquiry, i. e., whether or not the law of selling "half tags plus $1.00 is still in effect and when must a car be bought for this to apply" (Schedule 158.13), you are advised that this section is in effect and applies to all motor vehicles other than those mentioned in Schedules 158.1 and 158.5 as amended. This schedule would also have application in those cases where a party purchased an automobile prior to November 15th but did not operate the same on the highways until on or after April 1st. Cf. Opinion of Attorney General to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, dated February 26, 1937 (Quarterly Report of Attorney General, Vol. VI, page 97).

You will note that in the opinion to Judge Hill, this office specifically held that a party possessed of an automobile on or prior to November 15th was not entitled to purchase license on a monthly declining basis, even though said automobile was not operated on the highways during the license year, either prior or subsequent to November 15th, until application was made for the license. Insofar as the opinions to Hon. Eugene B. Henry, Jefferson County, dated April 21, 1937 (Quarterly Report of Attorney General, Vol. VII, page 45) to Hon. F. B. Thompson, Judge of Probate, Clay County, dated February 7, 1938 (Quarterly Report of Attorney General, Vol. X, page 77) and to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, dated February 19, 1938 (Quarterly Report of Attorney General, Vol. X, page 98), conflict with the holding of the Hill opinion dated February 26.

1937, the same are hereby overruled, it being the judgment of this office that where a party is possessed of any motor vehicle on or prior to November 15th, regardless of whether same is being operated or not, the section of the Revenue Law providing for obtaining a license on a monthly declining basis is not applicable.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 29, 1939.

Hon. M. E. Pritchett,
Tax Assessor,
Marengo County,
Linden, Alabama.

Exemptions — Reconstruction Finance Corporation held exempt from ad valorem tax on personal property in Alabama.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of December 19, 1938, in which you request my opinion as follows:

"Please find enclosed letter from the Reconstruction Finance Corporation, Birmingham, Ala., and Agency Counsel's memorandum in regard to their Assessment in this County for the Tax year 1939 on Handle Factory Equipment located in this County.

"This Equipment was assessed to Mrs. Louisa M. Winters, Linden, Ala., for the Tax year 1938, at a value of $2100.00.

"As the Reconstruction Finance Corporation is claiming exemption on same, will appreciate an opinion on this at once."

In reply, I wish to advise you that in my opinion the property involved in your request and now owned by the Reconstruction Finance Corporation is exempt from taxation so long as the ownership shall remain in the Reconstruction Finance Corporation. The property in question consists of handle factory equipment and the original lease provides that all the property shall be considered personalty, and the mortgage to the Reconstruction Finance Corporation covered this personal property only. When this mortgage was foreclosed, title to this personal property here considered passed to the Reconstruction Finance Corporation, and as long as said title remains in the said Reconstruction Finance Corporation, in my judgment, the property is exempt from State taxation.

I wish to call your attention to 45 U. S. Stat. at Large, page 5, Section 10, which, as last amended, provides as follows:

> "Section 10. Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed by the United States, by any territory, dependency or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any territory, dependency or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed."

You will observe from reading the above-quoted provision that the property here considered is by Act of Congress exempt from taxation and that the assessment of this property to the Reconstruction Finance Corporation is in error, since the property is exempt from taxation as above set out.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 29, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Commissioners Courts — No authority of law exists for appropriation of money to private corporations for the purpose of reducing the circulation of Communistic literature and the eradication of Communistic activity in a county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 8, 1939, in which you request my opinion as follows:

> "Please advise whether or not Elmore County can legally appropriate money to the Southern Rescue Extension Service Inc., a colored organization, for the purpose of reducing the circulation of Communistic literature and the eradication of Communistic activities in this county."

In reply, I wish to advise you that Section 6755 of the Code of Alabama, 1923, as amended, (See Michie's Code of 1928, and supplements) controls the answer to your question.

The appropriation for the purposes you set out would necessarily have to be made by the governing body of your county. Commissioners courts and similar governing bodies of counties are creatures of statute and possess no powers not conferred by statute. See **State v. Street,** 23 So. 809. See also, **Quarterly Report Attorney General,** Vol. III, p. 44. The power to appropriate funds to the credit or aid of a private corporation, as outlined by you, is not given by law. And no authority exists for this appropriation.

I also wish to refer you to the case of **Rogers, Treasurer v. White, Secretary,** 14 Ala. App. 482.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 29, 1939.

Hon. Chris. J. Sherlock,
State Highway Department,
Capitol.

State Highway Department has authority to name highways, using the same procedure as in numbering them.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion under date of March 2, 1939, which is as follows:

"Please advise this Department as to its authority and the procedure to be followed in the naming of State Highways.

"Reference is made to page 86 of the Acts of Alabama, 1932, Extra Session and to the other sections of the code in naming State Highways."

In answer to your question, it is my opinion that the State Highway Department has the authority to name highways and that the procedure to be followed is the same as in numbering them.

Your attention is directed to the fact that Section 1391 of the 1923 Code designated certain roads as State trunk roads and assigned them a number.

Your attention is further called to Section 1394 of the Code, which provides as follows:

"Section 1394. Errors as to numbers and renumbering of roads.—The fact that one road may be given two different numbers, or that two roads may be given the same number shall not prevent each road being adopted, and established as a state trunk road, and the state highway commission may, at its pleasure, change the numbers of such roads."

In construing the authority of the Highway Department to change the numbers of State trunk roads (Biennial Report of Attorney General, 1928-30, page 97) the opinion was there expressed that the Highway Department had authority to change a number of State trunk roads as they saw fit; that the numbers previously assigned to them under Section 1391 were merely descriptive and used for the purpose of convenience to the lawmaking body.

Your attention is further called to Act No. 702, General Acts 1931, page 827, the pertinent part reading as follows:

"That all highways built or maintained by and through Federal or or State aid shall be designated by numbers and by names, where such highways are known by names, on the directional signs erected along said highways and upon the maps authorized and published by the State."

In addition to the above quoted authority, your attention is further called to Section 1397 (7, 18, 21, 28, 45, 46) of Michie's 1928 Code, which sets out in detail the authority and powers of the Highway Department. A careful consideration of the sections and authorities herein referred to leads me to the conclusion that you have ample authority to name highways and that you should follow the same procedure as in numbering them.

This disposes of your inquiry except the reference made to Act No. 65, page 86 of the 1932 General Acts, Extra Session, the substance of which is as follows:

That it shall be unlawful to name, call or designate any building, bridge, or other structure or any institution constructed, erected, maintained or financed in whole or in part by the State of Alabama after any person then living, provided that the provisions of this act do not apply to buildings, bridges, or other structures or institutions now existing.

It is my opinion that this does not apply to highways and, therefore, places no restriction upon the authority of the Highway Department to name highways.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 29, 1939.

Hon. I. I. Moses,
Chairman, County Commission,
Russell County,
Phenix City, Alabama.

Counties — Court of County Commissioners may reimburse doctors to extent of reasonable sum for services rendered under section 186, Code of Alabama, 1923, even though claims are barred by statute of limitations of three years relative to open accounts.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion, dated March 18, 1939, which is as follows:

"In regard to the opinion requested on the claim of Dr. Clarence Long against Russell County about which you wrote me on February 21 I deem it advisable to let you have all the material pertaining to the whole thing before you and for that reason I want to withdraw the original request and substitute a request for an opinion upon all the following items:

"On July 2, 1932, Dr. W. B. Hendricks filed a claim with Russell County for $1512.00 in behalf of himself and Dr. Long for administering diphtheria anti-toxin to 1008 children. The claim had attached to it a sworn statement reciting 'due installment on itemized bill attached $250.00.'

This claim was paid by Russell County. On August 2, 1932, a second claim was filed with the County Commission for second installment on attached statement $500.00 and upon which $250.00 was paid on August 2 by the County. On November 1, 1933 an itemized statement was received from Dr. W. B. Hendricks in which the items hereinabove referred to were listed, showing a credit of $500.00 and in addition thereto a claim for 2365 people for typhoid vaccine at $1.00 each, amounting to $2365.00. Dr. Clarence Long at that time filed a similar claim for $2365.00.

"No formal contract was made by the County with either Dr. Hendricks or Dr. Long in writing. Dr. Long and Dr. Hendricks did talk to two members of the Board about performing the work and they apparently made or gave these two doctors to understand that they would pay them for their services but that they need not except their pay until the taxes for the next year would begin coming in.

"I am enclosing copies of all the claims pertaining to this matter as they appear on record in the office of the County Commission of Russell County save and except I am not including the list of persons to whom these services were rendered.

"Please advise the County Commission if either of these claims can be legally paid."

The statements you enclose are as follows:

"Hurtsboro, Ala. Feb. 25, 1932.
County Russell

"To Dr. Long & Hendrick, Dr.

To diphtheria antitoxin given children
(colored) 1008 @ $1.50 ..... $1,512.00"

"Russell County, Alabama,
To W. B. Hendricks, Dr.

To installment on itemized bill attached $250.00

The State of Alabama, Russell County.

Before me, G. W. Mitchell, A. N. P., in and for said County, personally appeared Dr. W. B. Hendrick, who being duly sworn states upon oath that the foregoing account is just, correct and true, and that no part of said account has been paid.

W. B. Hendrick, Claimant.

Sworn to and subscribed before me 2nd day of July, 1932.
G. W. Mitchell, N. P."

"RUSSELL COUNTY, ALABAMA.

To W. B. Hendricks Dr.

To Second installment on attached statement $500.00

Pd. Aug. 2, 1932 ..... 250.00

The State of Alabama, Russell County.

Before me, G. W. Mitchell, a N. P., in and for said County, personally appeared W. B. Hendricks, who being duly sworn states upon oath that the foregoing account is just, correct and true, and that no part of said account has been paid.

W. B. Hendricks, Claimant.

Sworn to and subscribed before me this 2 day of August, 1932.

G. W. Mitchell,
Notary Public."

"RUSSELL COUNTY, ALABAMA

To Dr. Clarence Long, Dr.

To 2365 people vaccinated for typhoid fever @ $1.00 ..... $2365.00

The State of Alabama, Russell County.

"Before me, Clowell P. Goss, a Notary Public in and for said County, personally appeared Clarence Long who being duly sworn states upon oath that the foregoing account is just, correct and true, and that no part of said account has been paid.

Clarence Long, Claimant.

Sworn to and subscribed before me this 2nd day of November, 1933.
Clowell P. Goss, Notary Public."

"STATEMENT

11-1-33

M. Russell County

In acct.

To Dr. Clarence Long, Dr.
Hurtsboro, Ala.

1933

Nov. 1 To 2365 people vaccinated for typhoid fever @ $1.00 ..... $2365.00"

"RUSSELL COUNTY, ALABAMA

To W. B. Hendrick, Dr.

To 2365 people typhoid vac. @ $1.00 per		$2365.00
To 1008 children given diphtheria toxoid @ $1.50		1512.00
July 1932 by 1st installment	$250.00	
Aug. 1932 by 2nd installment	250.00	$500.00
Balance due		$3375.00

The State of Alabama, Russell County.

Before me, G. W. Mitchell a Notary Public in and for said County, personally appeared Dr. W. B. Hendricks, who being duly sworn states upon oath that the foregoing account is just, correct and true, and that no part of said account has been paid.

W. B. Hendricks, Claimant.

Sworn to and subscribed before me, this the 2nd day of November, 1933.

G. W. Mitchell, Notary Public."

"STATEMENT

Hurtsboro, Ala. Nov. 1, 1933

Russell County.
To W. B. Hendricks, Dr.

To Ant. diphtheria toxin given children & School (col)

1008 @ $1.50 per $1512.00

1932

July — By 1st Installment $250.00

Aug. — By 2nd Installment 250.00

$500.00

Balance $1012.00
To 2365 people typhoid vac. 2365.00

$3375.00"

A careful study of the facts stated in your letter, coupled with an examination of the exhibits thereto attached, discloses that claimants presented two separate claims to the Court of County Commissioners, both claims being presented within twelve months after their accrual as required under Section 228, Code of Alabama, 1923, which is as follows:

"228. Claims barred if not presented.—All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

It is noted that the first claim presented was for services rendered in administering diphtheria anti-toxin. This claim was presented to the Board on July 2, 1932, and the Court of County Commissioners made two payments on the same, the last payment being on August 2, 1932. The second claim was presented on November 1, 1933, and was for services rendered in administering typhoid vaccine. Incorporated in the second claim and made a part of it was the first claim with proper credits being shown for payments theretofore made. Your letter and the exhibits fail to shown wherein the Court of County Commissioners took any action on the claim filed November 1, 1933, and, therefore, under Section 5680 of the Code of Alabama, 1923, the failure of the Court to enter a disallowance or reduction of this claim for ninety days, constitutes a disallowance of the same. Section 5680, Code of Alabama, 1923 is as follows:

"5680. Suit against county — Suit must not be brought against a county until the claim has been presented to the court of county commissioners, and disallowed or reduced by the court and the reduction refused by the claimant. The failure or refusal of the court to enter upon its minutes the disallowance or reduction of the claim for ninety days is a disallowance. Proof of the fact of presentation of such claim to such court of county commissioners may be made by parol evidence."

Under the above-quoted Code Section, there was a statutory disallowance of both claims ninety days after they were presented as one joint claim on, to wit, November 1, 1933, and a right of action against the county accrued in behalf of the claimants. The question now arises whether these claims are barred by the statute of limitations. I call your attention to Section 8941, Code of Alabama 1923, which provides that all civic actions must be commenced after the cause of action has accrued and within the period prescribed by the Code for the particular action and not afterwards. The claims in question were no more than open accounts (See Hays Cooperage Company vs. Louisville & Nashville Railroad Company, 88 So. 357, 18 Ala. App 18) and would, therefore, be subject to and fall directly under subdivision 1 of Section 8947, Code of Alabama, 1923, which is as follows:

"8947. Limitation of three years. — Within three years — 1. Actions to recover money due by open or unliquidated account, the time to be computed from the date of the last item of the account, or from the time when, by contract or usage, the account is due."

Premises considered, it is my opinion that the claims are barred by the three-year statute of limitation relative to open accounts. However, due to the fact that the claimants in good faith performed the services for the county during times when it appeared that an epidemic of contageous diseases seemed destined to take a heavy toll of human life and because the county was benefitted by the services performed, I am of the opinion that the Court of County Commissioners may reimburse claimants to the extent of a reasonable sum for said services rendered under Section 186 of the Code of Alabama, 1923. Said section is as follows:

"186. Equitable claims or demands against county; mode of payment provided. — The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, To reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, To refund to any person, firm or corporation, money or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvement, tick eradication or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the county was without authority to pay such claims on account of a defect in any law or any other reason."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 30, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Officers — Compensation — Authority of Comptroller to issue warrants —

1. House Bill 300 approved March 3, 1939, appropriates funds for the payment of the compensation of the officers and employees which it provides for.

2. Compensation of Legal Adviser to the Governor, as fixed by the Governor, is payable from the General Fund.

3. The Comptroller legally may issue warrants for the compensation of the officers and employees, as fixed by the Governor.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of March 10, 1939, in which you request my opinion as follows:

"I wish to refer you to House Bill No. 300, known as the 'Omnibus Bill,' which Act was approved by the Governor and went into effect as of March 3, 1939.

"1. Does House Bill No. 300 appropriate the money that would be represented in the difference between an Executive Head's or Chief Officer's or Subordinate Officer's or Employee's present annual salary before enactment of the Bill, in the event the annual salary so fixed or approved was more than was being received prior to such fixing or approving, provided the total of any salary so fixed or approved is not in excess of $5,700.00 per annum?

"2. Inasmuch as the Legal Adviser to the Governor is, at the present time, paid his salary out of the Governor's Contingent Fund, if the Governor, under the authority vested in him in said House bill No. 300, increased the annual salary of his Legal Adviser, such increase fixing the Legal Adviser's annual salary not in excess of $5,700.00, would not this have the effect of giving the Legal Adviser an entirely new or different salary to the extent that the entire amount of same should be paid from the State General Fund?

"3. Is the Comptroller legally authorized in this Act (House Bill No. 300), to honor monthly claims carrying a salary increase within the provisions of said Act, and is the Comptroller properly authorized to issue State Warrants in payment of such claims?"

Your first inquiry must be in the affirmative.

Senate Bill 42, approved February 16, 1939, provided that the Governor was authorized and empowered to fix the salaries of the officers and employees which were subsequently dealt with in House Bill 300, which was approved March 3, 1939. Senate Bill 42 was amended by the addition of Section 1 (a) and 1 (b) thereto, and thereupon the Governor requested an advisory opinion of the Supreme Court thereon. The court's response, **In Re Opinions of the Justices,** 186 So. 731, held that Senate Bill 42, as amended, was not constitutionally enacted, for the reason that it ran afoul of Section 45 of the Constitution because the act which it purported to amend was not set out at length. The advisory opinion suggested the proper manner in which the appropriation might be made. Pursuant to this suggestion, the Legislature enacted House Bill 300, which conforms in all respects to the advisory opinion, supra.

Answering your second inquiry, it is my opinion that the Legal Adviser to the Governor is entitled to the amount of his salary, as fixed by the Governor, and that the same should be paid from the General Fund of the state.

Section 764 of the Code of Alabama, 1923, provides that the Governor, whenever, in his judgment, it is expedient or necessary, may employ an attorney or attorneys to advise him in his official capacity and may agree with such counsel on his compensation; and that the compensation of such counsel shall be paid in the amount and at the time agreed upon, out of any general funds of the state, not otherwise appropriated.

House Bill 300 specifically carries an appropriation for the payment of the compensation of the Governor's Legal Adviser.

Your third question must be answered in the affirmative.

The only possible hindrance to the payment of the additional salaries is the provisions contained in Sections 68 and 281 of the Constitution. As here pertinent they provide:

> "Section 68. The legislature shall have no power to grant * * * any extra compensation * * * to any public officer, servant or employee, agent or contractor, after service shall have been rendered or contract made or to increase or decrease the * * * compensation of such officers during their terms of office."

> "Section 281. The salary, fees, or compensation of any civil officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

But these sections are not applicable to the officers and employees dealt with in House Bill 300 for the very obvious reason that they have no terms of office. Section 776 of the Code of 1923 provides:

> "Section 776. Governor may remove officers; exceptions. — The Governor may remove at his pleasure any officer or employee of the state or any political subdivision thereof, except counties and municipalities where the office or employment is held under the authority of the gov-

ernor. The right of removal may be exercised without regard to the term of office or employment prescribed by statute, but he may not remove an officer appointed to fill the unexpired term of an officer elected by popular vote, and he may not remove any trustee of an additional institution whose appointment is confirmed by the senate."

This has been re-emphasized by Section I of Senate Bill 39 approved February 1, 1939, which provides:

"Section I. The Governor is hereby authorized and empowered to remove from office and discharge from employment, with or without cause, any person who holds office or employment in any of the State Executive Departments and agencies by virtue of appointment by the incumbent Governor or any preceding Governor."

All of the officers and employees whose compensation is dealt with in House Bill 300 are appointed by the Governor, or under his direction.

The Supreme Court has spoken to this specific question in **State v. Sanders,** 187 Ala. 79. There the question was whether or not the compensation of the State Health Officer, who was appointed and his compensation fixed by the State Board of Health, could be increased during the term for which he was appointed. Speaking to the question the court said:

'"The statute does not fix his term of office nor his salary or compensation, nor does it put any limitations upon either, except that the salary shall not exceed $5,000 per annum. The board may employ him for a day, a week, a month, a year, or any number thereof, and pay him $1 per day, per week, per month, per year, or any other sum, provided the salary does not exceed $5,000 per annum. There is no constitutional or statutory requirement that the board shall elect him for any stated period or term; and, if it should elect him for a stated period of five years, we see no reason why it could not provide, then or subsequently, that it will pay him so much per day, week, month, or year, or graduate the amount according to the services performed, or increase the compensation, each year; provided, however, that the amount fixed does not exceed the rate of $5,000 per annum. If the board could have so provided when it first employed or elected appellee, we see no reason why it could not subsequently so provide, except so far as certain contractual relations or elements of contract may have entered into the employment; and these parties to the contract could change, of course, unless the statute or the Constitution prevents, and, as we have said, we know of no such provision, unless it be section 281 of the Constitution, which we have already held does not apply to the case."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 30, 1939.

Hon. C. B. Goldthwaite, Secretary,
Alabama State Board of Pharmacy,
Troy, Alabama.

Pharmacy—Board of Pharmacy may, in its discretion, register as a pharmacist without examination any person who is duly registered by examination in some other state, provided reciprocity provisions of Section 7 of Acts 1931, page 382, have been met.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 17, 1939, in which you request my opinion as follows:

"Mr. Floyd M. Stephens appeared in person before the Alabama State Board of Pharmacy, four of the five members being present, and stated his case for consideration as regards reciprocity.

"Mr. Stephens filed an affidavit, setting out his claims. He is registered by examination by the Georgia State Board of Pharmacy and by reciprocity in North Carolina. He graduated on June 10th, 1931, and stood the Georgia State Board Examination June 16, 1931.

"All members of the Alabama Board of Pharmacy present were of the opinion that the applicant in question was of good moral character and would make a good pharmacist.

"Two of the four members present were of the opinion that there might be some technicality in the Pharmacy laws of Alabama which the applicant has not complied with—namely, the College from which he graduated has not been recognized by this Board since 1927, but is, and has been generally recognized by other Southern States during this time.

"These two members of the four present are of the opinion that inasmuch as the applicant is a native Alabamian, of good moral character and appearance, well qualified as a pharmacist and well recommended by his present employer, as well as substantial citizens from the community in which he lives, that the Board could use its discretion and grant reciprocity in a case of this kind.

"In view of the foregoing facts submitted, the State Board of Pharmacy kindly ask, if it could use its discretionary powers to legally grant reciprocity to such party, when taking into consideration the Pharmacy Act of 1923, House Bill 192 by Goodwyn, see Sec. 3 and Sec. 5 thereof, also the Pharmacy Act of 1931, Sec. 7, Senate Bill 136, Harlan.

"The Board will thank you in advance to give us an official written opinion at as early date as possible."

The registration of one as a pharmacist by reciprocity is now governed by Section 7 of Act No. 332, S. No. 136, approved July 1, 1931, (General Acts 1931, page 377). Said section provided in pertinent part as follows:

> "RECIPROCITY: AND PROVIDED FURTHER, that the Board of Pharmacy in its discretion register as a pharmacist, without examination, any person who is duly registered by examination in some other State, provided that the said person shall produce evidence satisfactory to the Board of having had the required secondary and professional education and training, and is possessed of good character and morals, as demanded of applicants for registration under the provisions of the Pharmacy Act of this State; Excepting, that persons of good character who have become registered as pharmacists by examination in other States prior to the time this Act becomes in force shall be required to satisfy only the requirements which existed in this State at the time when they become registered in such other State; and Provided, also, that the State in which such person is registered shall, under like conditions, grant reciprocal registration as pharmacist, without examination, to pharmacists duly registered by examination in this State."

I am assuming that the State of Georgia grants similar reciprocity to pharmacists registered in Alabama.

The party in question graduated June 10, 1931 and stood the Georgia Board June 16, 1931, which I will assume was the day he became registered in Georgia. If so, he was registered in Georgia prior to the time the 1931 Act became effective, viz. July 1, 1931. Therefore, he could fall within the category of the following portion of the above-quoted provision:

> "Excepting, that persons of good character who have become registered as pharmacists by examination in other States prior to the time this Act becomes in force shall be required to satisfy only the requirements which existed in this State at the time when they became registered in such other State; * * *"

It will be seen that he will be required to satisfy only the requirements which existed in this State at the time when he became registered in Georgia, viz. June 16, 1931. The requirements then existing in this State are found in Act No. 423, H. 192, approved September 27, 1923, (General Acts 1923, page 561), which was incorporated in the Code of 1923 as Sections 2807-2835. I particularly refer you to Section 3 of the 1923 Act, the same appearing as Sections 2819-2820 of the Code of 1923, which are as follows:

> "2819. Qualification of licensed pharmacist.—In order to be licensed as a pharmacist within the meaning of this chapter, an applicant must be not less than twenty-one years of age, of good moral character, and shall have been licensed as an assistant pharmacist for not less than two years prior to his application for license as a pharmacist, or shall present to the said board of pharmacy satisfactory evidence that he has had not less than four years' practical experience in a pharmacy under the supervision of a licensed pharmacist, which experience shall include work directly related to selling drugs and poisons, compounding of pharmaceutical preparations and physicians' prescriptions, and keeping of records and making reports required under the state and federal statutes; or two years' practical experience, as above provided, and shall

have graduated in pharmacy at a school or college of pharmacy, recognized by said board of pharmacy, and also passed a satisfactory examination by or under the direction of said board of pharmacy. On and after January 1st, 1927, any applicant for a certificate as a licensed pharmacist shall be at least twenty-one years of age and a graduate of a class A college of pharmacy, that is, one holding membership in the American conference of pharmaceutical faculties. On and after January 1st, 1927, no assistant's license as a pharmacist shall be issued by the board of pharmacy."

"2820. Committee to determine 'A' grade colleges.—A committee of five consisting of the dean of the college of pharmacy at Auburn and the associate professor of pharmacy at Auburn and three to be appointed by the Alabama pharmaceutical association at its annual meeting each year shall have the power to pass upon the colleges of the United States who are entitled to come within the meaning of 'A' grade colleges within the meaning of this chapter."

One of the requirement of this section is that the applicant be a graduate of a school or college of pharmacy recognized by said Board of Pharmacy. You state in your letter that the college from which the applicant in question graduated has not been recognized by your Board since 1927. This requirement of the Alabama law was not adhered to in Georgia as the applicant was registered in Georgia on June 16, 1931. Therefore, the applicant did not and could not satisfy the requirements existing in the State at the time of his registration in Georgia and would not be entitled to reciprocity under the last quoted portion of Section 7 of Act No. 332, supra.

However, he may be granted reciprocity if he can meet the requirements of the first portion of the reciprocity part of Section 7 of Act No. 332, supra, which is as follows:

"RECIPROCITY: AND PROVIDED FURTHER, that the Board of Pharmacy in its discretion register as a pharmacist, without examination, any person who is duly registered by examination in some other State, provided that the said person shall produce evidence satisfactory to the Board of having had the required secondary and professional education and training, and is possessed of good character and morals, as demanded of applicants for registration under the provisions of the Pharmacy Act of this State; * * *"

The Pharmacy Act of this State, as above-named, refers to the 1931 Act. We must now look to the requirements of the 1931 Act. The requirements are set out in the first paragraph of Section 7 of the 1931 Act, supra. Same provides in pertinent part as follows:

"* * * Every applicant for examination and registration as a pharmacist shall be not less than twenty-one (21) years of age, of good moral character and temperate habits, a graduate of a grade A school or college of pharmacy, or department of pharmacy of a university, whose requirements are not less than the minimum requirements for membership in the American Association of College of Pharmacy, recognized by the Board of Pharmacy, and shall file proof satisfactory to the Board, substantiated by proper affidavits, of sufficient service and experience in a retail pharmacy, under the supervision of a registered or licensed phar-

macist, to make a total, together with actual time of college attendance, of at least four (4) years of pharmaceutical training; * * *"

The moral qualifications of the applicant having been established, if the Board determines, as a matter of fact, that the school from which the applicant graduated met the above requirements at the time of graduation, it may, in its discretion, grant reciprocity.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 30, 1939.

Hon. Oliver E. Young, Senator,
12th Senatorial District,
Vernon, Alabama.

Counties—May make appropriation for decorating county library building.

County Boards of Education—May make appropriation for decorating county library building.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter under date of March 4, 1939, in which you request my opinion as follows:

"Will you please advise me whether or not under the existing laws the County Board of Revenue or Commissioners of Walker County and the County Board of Education of Walker County have the authority to appropriate money from their funds for decorating the new Walker County Library building."

I am of the opinion that both of your inquiries should be answered in the affirmative.

The case of **Gray v. State,** 231 Ala. 229, 164 So. 293, involved a proceeding to acquire the signature of the chairman of the County Commission of Walker County to a warrant issued on an appropriation by the County Commission for the support of the Walker County library, a free public library serving the citizens and public schools of Walker County. The Court in said case observed as follows:

"The governing body of the county may establish and maintain, or aid in establishing and maintaining, free public libraries for the use of

the citizens of the county, separately or in connection with the public schools, and make appropriations therefor from the county treasury, not exceeding $5,000 annually. Code, Section 1545, as amended by Acts 1927, p. 69, Section 1, School Code 1927, p. 341.

"The supervision of the libraries is vested in a county library board (Code, Section 1546, School Code 1927, Section 400) with powers defined in Code, Section 1547, as amended by Acts 1927, p. 69, Section 2, School Code 1927, p. 341.

"County boards of education may make appropriations for libraries for public schools. School Code 1927, Section 391.

"It is averred and proved that pursuant to these statutory provisions a county library board has been established in Walker County, and a county library for use of citizens and public schools established and maintained for several years, with the aid of appropriation by the county governing body from the county treasury, appropriations by the county board of education, certain state library funds, and donations from the Rosenwald fund."

Section 1545 of the Code of 1923, supra, has been recently amended by Act No. 198, approved March 16, 1939. The amendment is substantially the same as the original act but omitted the limitation of the appropriation to $5,000.00 annually.

In an opinion of this office rendered to the Judge of Probate, Houston County, on December 11, 1935 (Quarterly Report of Attorney General, Vol. I, p. 328), it was held that a County may make an appropriation for the erection of the county library building.

From the above, it appears that both the County Board of Revenue and the County Board of Education of Walker County could make appropriations for the erecting of the library building in question.

If appropriation can be made for erection of the building, it follows that the appropriation could be made for a reasonable decoration of one already built. A reasonable decoration, in my opinion, is incident to the construction of the building.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 30, 1939.

Hon. W. L. Hobbs,
Clerk, Circuit Court,
Russell County,
Phenix City, Alabama.

The Solicitor's fee for the violation of the provisions of Section 5539, Code of Alabama, 1923, is $10.00.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 21, 1939, in which you requets my opinion as follows:

"A number of defendants have been arrested charged with Sunday Violations under Section 5539 of the Code of Alabama of 1923, the particular part of this Section that they are being prosecuted under is GAMING ON SUNDAY.

"Please advise the correct solicitor's fee to be charged as part of the Court costs if these defendants are convicted.

"These cases are set for trial at the March term of County Court, and I will greatly appreciate an official opinion at your earliest convenience."

In answer to your request, permit me to say that Section 3738, Code of Alabama, 1923, fixes the solicitor's fees which shall be charged against defendants on conviction, but no specific solicitor's fee is fixed therein for a conviction under Section 5539, Code of Alabama, 1923. Therefore, the solicitor's fee for a conviction under this section is fixed by the following provision of Section 3738:

"For each conviction of a misdemeanor, not otherwise provided for—$10.00."

It is my opinion that the solicitor's fee for a conviction under this Section is $10.00. Biennial Report of Attorney General, 1928-30, p. 224.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 30, 1939.

Hon. Woolsey Finnell,
Tax Collector,
Tuscaloosa County,
Tuscaloosa, Alabama.

1. Escape taxes are due immediately after the assessment becomes final.

2. Escape tax assessments should be collected in the same manner as assessments of an ordinary delinquent taxpayer.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion under date of March 8, 1939, which is as follows:

"The Tax Assessor of Tuscaloosa County has handed me several escape tax-assessments during the past thirty days. Some of them are assessments on personal property, others on real estate. My interpretation of the law is that escape taxes are due and must be collected as soon as possible after the Tax Assessor passes the assessment to the Tax Collector.

"We have notified all those who are affected by these escape assessments, but many of them have ignored the notices.

"Please give me instructions as to how I shall proceed to collect these escape assessments."

It is my opinion that, since taxes upon escape property are due immediately upon their assessment becoming final, you should proceed with the collection of these taxes as you would in the case of any delinquent taxpayer.

Section 45 of Chapter 2, General Act 1935, page 280, provides as follows:

"Section 45. Whenever the Tax Assessor shall discover that any property has escaped taxation in any assessment within five years next preceding the current year, he shall list, return and value said property for assessment for the years during which same has escaped taxation, and shall also endorse on such returns the year or years for which the property has escaped taxation, and the accrual of a penalty of ten per cent of the taxes assessed thereon for each year. The Tax Assessor shall give notice of such escape assessment by registered mail, return receipt demanded, to the owner or to the agent or attorney of such owner, notifying such person to appear before the Assessor in person, or by agent or attorney, within twenty days after such notice is given, if there be an objection to the assessment and notifying such person that if no objection is made said assessment will be made final on the twentieth day after the mailing of such notice of escape assessment. If on the date set for hearing such objection the person against whom the assessment is made fails to appear, or, if in the opinion of the Tax Assessor the assessment should not be changed and the assessment is proper, then the Tax Assessor shall make the **assessment final.** 'The property owner if he has filed objection to such assessment, may appeal from the assessment to the Circuit Court of the County in which the property is located within thirty days after such assessment becomes final, by giving notice in writing to the Tax Assessor and by filing a copy of such notice with the Clerk of the Circuit Court and giving bond to be approved by and filed with the Clerk of the Circuit Court to cover costs and thereafter such case shall be tried as other tax cases appealed to the Circuit Court from the Board of Review. The taxpayer or the State shall have the right to demand a trial by jury by filing a written demand therefor, within ten days (10) after the appeal is taken. Whenever any escape assessment **is made final,** the taxes **shall immediately become due** and the Assessor or Deputy Assessor shall **forthwith certify** the assessment to the Collector, **who shall forthwith collect same,** unless at the time of taking

the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the Clerk of the Circuit Court in double the amount of the taxes, payable to the State of Alabama, conditioned to pay all taxes, interest and costs due the State, County or any agency or subdivision thereof.'" (Emphasis supplied)

It will be noticed that this section provides that after the Tax Assessor has made an assessment upon property which has escaped taxation and the said assessment has become final, that the taxes as asssesed become due immediately. The section further provides that the Assessor or his deputy shall immediately certify the same to the Tax Collector, who shall forthwith collect the same.

It is no doubt useless to outline the procedure here. However, I wish to call your attention to the following sections of the 1935 Revenue Code. These sections will guide you in collecting these escape assessments.

Section 170 of the Revenue Act provides that after the Tax Collector gives ten days' notice he shall levy upon and sell the personal property of the delinquent taxpayer.

Section 172 provides that no property is exempt from such levy and sale, therefore any personal property owned by the delinquent taxpayer is subject to levy and sale.

Section 177 provides that when no personal property can be found or if the amount is insufficient on which the delinquent taxes can be collected, that the real estate of such taxpayer or the real estate upon which the taxes are a lien shall be sold for the payment of such taxes in the manner hereinafter provided.

Sections 214-242, inclusive, provide the manner to be followed in selling such real estate, and are so clear that I am sure they need no official interpretation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 30, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Whenever money is transmitted to the State treasury by the clerk or register of the circuit court, said clerk or register is entitled to 5% commission for collecting and transmitting the same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 24, 1939, in which you request my opinion as follows:

"I wish to call your attention to Act on page 229, Acts of 1936-37, and page 167, Acts of 1936, also to opinion of the Attorney General, page 145, Quarterly Report July 1, 1936 to September 30, 1936.

"Does the above mentioned opinion authorize the Circuit Clerks to deduct five percent commission on Highway Fines collected and remitted under the provisions of the above mentioned Acts?"

My answer to the above request is in the affirmative. I call your attention to General Acts, 1931, page 669 (Code Supplement, 1936, No. 7278(1), Michie), which is as follows:

"Fees of clerk and register for collection of money—The clerks and registers of the several circuit courts of the state of Alabama shall receive five per cent of any sum or sums collected by such clerk or register for the state of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such clerk or register making the collection from such sum or sums collected."

The Acts referred to in your inquiry provide that all fines collected for a violation thereof shall be paid into the Highway Patrol Fund, which is a fund of the State. Therefore, when money is transmitted by the clerk or register of the circuit court to the Highway Patrol Fund, the clerk is entitled to 5% commission for collecting and transmitting the same, under the authority above cited.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 30, 1939.

Hon. G. M. Watson,
Superintendent of Education,
Marengo County,
Linden, Alabama.

1. Public funds deposited by the custodian of county school funds in a depository bank duly designated by the County Board of Education are preferred claims under the law of Alabama.

2. Statutes providing for selection of depositories for deposit of funds and taking of bonds to secure against loss held a waiver of preference over other creditors in event of insolvency.

3. It is a matter of discretion to be exercised by the Board of Education in depositing school funds in the bank as to whether it

will require security, thus waiving its right to preference and its lien or whether it will deposit such funds and rely upon its preference and lien given it by law.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 3, 1939, in which you request my opinion as follows:

"The Marengo County Board of Education has found that in making application for a fidelity bond to be made for the custodian of county school funds by a surety company, it is required to designate the depository for official use by the custodian of county school funds. The County Board of Education makes the following statement in the application. 'The said funds shall be deposited in the said bank as said depository without requiring security of any nature whatsoever from the said bank.'

"The Marengo County Board of Education has been accustomed to require the depository bank to post securities to guarantee deposits made by the custodian of county school funds. This procedure has been questioned upon the assumption that such deposits of public funds constitute preferred claims; and that the requiring of special security of the bank depository destroys the preferred status of the claim as it relates to other deposits of the bank. The questioner advances the idea that the practice might be sound if ample security is set aside for the protection of such deposit, but that the deposit loses its preferred standing as it relates to the general deposits of the bank depository.

"It is hoped that the foregoing will assist in making the request for your opinion clear. You are, therefore, respectfully asked to render an opinion upon the following questions:

"1. Are public school funds deposited by a custodian of county school funds in a depository bank duly designated by the County Board of Education regarded as a preferred claim under the laws of Alabama in the event of a liquidation of the assets of the closed depository bank?

"2. If such deposits of public school funds are regarded as a preferred claim would the requiring of the depository bank a specially designated security, which might prove of small value in case of liquidation, destroy the preferred status of such public school deposit as it relates to the usual or ordinary deposits of the depository bank?

"In the event the specially designated security is fully sufficient to cover the public school deposit, it might be unnecessary to consider this question but sometimes the security posted is of a character or type whose value under certain conditions evaporates or decreases to unexpected levels. The aim is to fortify against the unlooked for shrinkage of any security that might be posted. Therefore, this leads up to the concluding question.

"3. Would it be preferable, or possibly more satisfactory, to require, or not to require, specially designated security of a depository bank, which has been so designated by the County Board of Education for official use by the custodian of county public school funds?"

My answer to your first question is in the affirmative. This is based on the opinion of the Supreme Court in the case of **Montgomery, Superintendent of Banks v. Sparks, Tax Collector,** 225 Ala. 343, 142 So. 769; also **Montgomery, Superintendent of Banks v. State, et al,** 228 Ala. 296, 153 So. 394.

Your second question is likewise answered in the affirmative. It is my opinion when your county school body requires additional security, such as bonds etc., to protect the funds of the board, placed on deposit it waives all of its right to be classed as a preferred depositor or creditor. Justice Knight, in the case of **Montgomery, Superintendent of Banks v. State, et al,** 228 Ala. 296, 153 So. 394, held this to be the rule. **Conecuh County v. Peoples Bank of Evergreen,** 230 Ala. 457, 161 So. 515.

Answering your third request, this is a matter that should be left up to the sound discretion of your board. If it requires security before depositing school funds, then in our opinion, it waives its priority and lien. If it does not require such security then, it will be classed as a preferred creditor and can assert its lien.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 30, 1939.

Hon. E. J. Fulmer,
Sheriff, Lauderdale County,
Florence, Alabama.

1. Sheriffs for services rendered in non-support cases entitled to reimbursement for his actual disbursements.

2. The court of county commissioners, board of revenue or other like governing body of the counties is without authority to pay for fuel used in cooking food for prisoners or used in the home of the sheriff.

3. Sheriffs are entitled to fee provided by Section 7287, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 21, 1939, in which you request my opinion as follows:

"Thanking you to please send me your opinion on the following:

"Should the Sheriff collect an arrest fee for Non Support Warrants issued out of the Probate Court?

"Should the Sheriff pay for coal used in cooking food for prisoners, and used in the Sheriff's home?

"Should the Sheriff collect $90.00 a year Ex Officio road services?"

In answer to your first inquiry, I wish to refer you to Section 4492, Code of Alabama, the pertinent part of which is as follows:

> "The Sheriff of said county shall serve all writs, processes and papers, directed by the Court or judge thereof to be served by him, and a suitable allowance shall be made to him by the County Commissioners, or Board of Revenue, of such county, for his actual disbursements in affecting such service * * *. There shall be no costs of any kind whatsoever taxed in cases arising under this chapter."

In my judgment, the section of law above referred to prohibits the Sheriff from collecting the usual arrest fee and limits his compensation in nonsupport cases to actual disbursements made by him.

My answer to your second inquiry is in the affirmative. I am enclosing a copy of an opinion of this office written April 15, 1935, to Hon. F. B. Thompson, Judge of Probate of Clay County. This opinion holds that the county cannot pay for fuel used in cooking food for prisoners, and certainly if it cannot pay for fuel used in cooking for prisoners, it cannot pay for fuel used by the Sheriff in cooking in his home. **Holcombe v. Mobile County**, 229 Ala. 77, 155 So. 60.

Answering your third inquiry, this office has held in an opinion written September 30, 1938, to Hon. Chas. W. Lee, State Comptroller, Quarterly Report of Attorney General, Vol. XII, page 212, that Sheriffs are entitled to a fee provided for by Section 7287, Code of Alabama of 1923, not to exceed $90.00 annually, upon showing to the court of county commissioners that he has discharged his duties in relation to public roads. Of course, the provisions of this opinion must be followed strictly.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 30, 1939.

Hon. Howard Kirby,
Clerk, Circuit Court,
Etowah County,
Gadsden, Alabama.

Where a defendant is convicted for a criminal offense and confesses judgment for same and the judge makes an order staying

execution for a certain number of days, the clerk should not be charged with the costs in the case by Examiner of Accounts.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 25, 1939, in which you request my opinion as follows:

"Please render me your opinion as early as possible on the following matter:

"For example—A defendant confesses judgment for fine and costs upon which execution is required to issue after the lapse of ten days and before the expiration of ninety days and just shortly before the 90th. day from date of judgment the Judge enters on the confession a stay of execution for 30 or 60 days or more.

"Would I be chargeable by the State examiner for failure to issue execution if I do not issue same before the date to which it is stayed by the Judge?"

My answer to your request is in the negative. If the judge entered an order staying the issue of execution for a certain length of time, you should not be held accountable for failure to issue execution on same within the limits set by the court.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 30, 1939.

Hon. Howard Kirby,
Clerk, Circuit Court,
Etowah County,
Gadsden, Alabama.

Clerk of the Circuit Court acting as ex officio clerk of the County Court, is required to keep minutes of such court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 11, 1939, in which you request my opinion as follows:

"Please render to me your opinion on the following matter:

"Is there any section of law that requires me as Ex-Officio Clerk of the County Court to write Minutes of the County Court?"

In the County Court there are various orders of the court that have to go on the minutes of the court, such as judgments, orders, and the sentences pronounced on the judgment, and are all necessary entries upon the minutes of the court. **Carmichael v. Mathews,** Clerk, 134 Ala. 210. There must be a judgment in every case tried in the county court and there must be a sentence or a pronouncement of the court in every case disposed of in said court. Therefore, the clerk of the county court must write these minutes.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 30, 1939.

Hon. E. W. Vance, Member,
Board of Revenue, Barbour County,
Eufaula, Alabama.

1. Failure of Board of Revenue to disallow or reduce a claim within 90 days is a disallowance.

2. Board of Revenue has authority to reconsider and allow claim which has previously been disallowed, provided same is not barred by the statute of limitations at the time of reconsideration.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion under date of March 4, 1939, which is as follows:

"In 1935 in building a new road in Barbour County, which said road passed through the town of Clio, there was a deed given by Mrs. Dovie Brown to Barbour County for a right of way. It seems that Mrs. Brown claims there was an understanding—(at the time of her executing the deed)—that none of her **pecan trees** were to be cut down. It so happened that three of her pet pecan trees were cut down by the road builders.

"In July, 1935, she presented a claim to the County for $90.00. The Board of Revenue did not refuse to pay the claim but the matter was postponed for investigation and consideration. Nothing was ever done. Several times after that the Browns attended the Board meetings—but no action was ever taken.

"Yesterday—March 3rd, the Browns were back urging action on the Claim. The Board was advised that Section 5680 covered the presenta-

tion of claims to the County, and that even if the Board desired to pay the claim, or to compromise the claim—it should be submitted to the Attorney General's office—for an opinion in view of the fact the Examiners of Accounts are prone to criticize public officials—unless they are free from criticism. There was nothing ever entered upon the minutes of the Board—Ninety days has passed since the matter was last before the Board. The question is—in the event the Board should now decide to settle the matter, in view of Section 228 of the Code of 1923 providing claims being barred within twelve months—and no suit filed—has the Board the authority to settle the claim now. We would thank you for an opinion."

As I understand the facts in your letter, the claimant filed her claim with you in July, 1935, which was within the twelve months period prescribed by Section 228 of the 1923 Code; that the payment of this claim was not refused by the Board when first presented, but action on the same was postponed for investigation and consideration and that since that time the claimant has appeared before the Board on several occasions and is now urging payment of her claim.

Under this statement of facts, I am of the opinion that the Board is without authority to consider and allow this claim.

The failure of the Board of Revenue to disallow or reduce a claim in ninety days is a disallowance. **Section 5680 of the 1923 Code; State ex rel City of Mobile vs. Board of Revenue,** 80 So. 368.

There appears to be a well settled principal of law in this State that a Board of Revenue or other like governing body has authority to reconsider and allow a claim which they have previously disallowed, provided that at the time of reconsideration the claim has not been barred by the statute of limitations. Quarterly Report of Attorney General, Vol. I, page 231; Office Edition of Attorney General, Book 3-A, page 152.

From the facts presented in this case, it appears that the claim is an open account; that the Board of Revenue failed or refused for more than ninety days to disallow the same, which constituted a disallowance by operation of law; that after the disallowance by operation of law the claimant failed to file suit against the county within the three-year period allowed for filing suits on open accounts; and that the Board of Revenue failed to reconsider the claim within the said period of three years. This being true, I am of the opinion that the claim is barred by the statute of limitations of three years and that the Board is without authority to reconsider or allow the payment of same.

Section 186 of the Code of 1923 gives the Court of County Commissioners broad powers in payment of so-called equitable claims as enumerated therein. I do not think however, that the present claim can be classed as services performed or money or property advanced.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. I. M. Presley,
Deputy Solicitor,
DeKalb County,
Fort Payne, Alabama.

Dog Control Act—Rabies—

Persons owning dogs coming within the provisions of Act No. 200 and not inoculated are subject to prosecution in compliance with Section 12 of Act No. 200.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of February 25, 1939, in which you request my opinion as follows:

"I write to request your opinion relative to the import of an Act of General Acts of the Legislature, Extra Session, 1936-1937, page 230.

"I desire your opinion as to whether under said Act it is a violation for a person who is an owner of a dog to fail or refuse to have it inoculated under the provisions and by the means set out in said Act.

"A prosecution for such failure to vaccinate was originated in DeKalb County Court and on the conviction of the defendant the case was appealed to the Court of Appeals and was decided by that court on June 21, 1938, the style of the case being Julian Collins versus the State. The opinion reversing the case dealt with other matters of law and did not touch the question herein inquired about unless by implication. DeKalb County has failed to provide a pound or place of confinement for dogs not vaccinated as required in the Act and instead of impounding unvaccinated or uninoculated dogs, the Rabies Inspector seeks to prosecute for failure to vaccinate."

The so-called Dog Control Act provides in Section 12, Act No. 200, page 230, Acts 1936-37:

"General Provisions.—Any person violating or aiding in or abetting the violation of any provision of this act, or counterfeiting or forging any certificate, permit or tag or making any misrepresentation in regard to any matter prescribed by this act, or resisting, obstructing or impeding any authorized official in enforcing this act shall be guilty of a misdemeanor and upon conviction shall be fined not less than $1.00 nor more than $10.00, and for the purpose of enforcing of this section, any court of competent jurisdiction, including justice of the peace, shall have jurisdiction in such offenses."

This section makes the violation of this act a misdemeanor and subjects the owner of the dogs coming within its provisions to prosecution. See Vol. VIII, Quarterly Report of Attorney General, page 238.

The case referred to in your request, **Collins v. State,** can be found at page 779 of the Advance Sheets of the Southern Reporter for February 16, 1939, and will be reported in Vol. 185, Southern Reporter, page 779. This case is not controlling in regard to your question. It was reversed on the insufficiency of the pleadings rather than on the question of substantive law which you propound. In the words of Judge Bricken:

"The complaint in this case covered a period of time twelve months anterior to its date, a larger portion of said time when the acts complained of were no offense under the law. As to this, the act in question being new, the complaint should have charged that the offense complained of was committed by the accused subsequent to or since March 2, 1927. The demurrer (grounds 10 and 11) raise this point, and the court erred in holding the demurrer was not well taken. This question needs no elaboration at our hands, the following authorities being in point on this proposition: Jinright v. State, 24 Ala. App. 277, 134 So. 456, and cases cited.

"The affidavit, or complaint, supra, did not attempt to follow the language of the Statute, nor was there any designation of the misdemeanor by name, or by some other phrase, which in common parlance designates it. No sufficient statement or averment of the essential ingredients of the alleged offense appears therein. Several grounds of demurrer were directed to these defects and should have been sustained."

Therefore, it is my opinion that persons violating the so-called Dog Control Act are subject to prosecution.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. F. F. Lyon,
Treasurer, Shelby County,
Columbiana, Alabama.

1. Where sentence is suspended and defendant put on probation and no mention is made of costs and there is no judgment for costs, then such costs cannot go against the Fine and Forfeiture Fund of the county.

2. Where sentences are suspended and defendant put on probation, defendant, being ordered to pay all costs, if this expression "pay all costs" is simply the bench notes of the presiding judge and there is no judgment for costs, then such costs cannot go against the Fine and Forfeiture Fund of the county.

3. Where sentences are suspended and defendant put on probation and ordered to pay sheriff's and clerk's cost, no mention being

made of witness fees, trial tax, etc., if the expression "ordered to pay sheriffs and clerks costs", is merely the bench notes of the judge and there is no judgment for such costs, then the sheriff's and clerk's costs cannot be a charge against the Fine and Forfeiture fund. Likewise, if there is no judgment for witness fees, this will not become a charge against the Fine and Forfeiture Fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 2, 1938, in which you request my opinion as follows:

"Application has been made in this office for registration of Witness Script involving cases where Defendant has been put on 'Probation.'

"These cases fall into three distinct classes, as follows:

"1. Sentence suspended and Defendant put on probation for a number of years, no mention of costs being made.

"2. Sentence suspended and Defendant put on probation for a given time, Defendant being ordered to pay all costs.

"3. Sentence suspended and Defendant put on probation for a given time and ordered to pay Sheriff's and Clerk's costs, no mention being made as to Witness Fees, Trial Tax, etc.

"Will you kindly advise me at your earliest convenience whether these are valid claims against the Fine and Forfeiture Fund of Shelby County, Alabama."

In writing this opinion, I am presuming the suspension of sentence you refer to was had under the Suspension Sentence Act of 1932, approved September 28, 1932, General Acts 1932, Extra Session, page 54. If I am right in this presumption, I call your attention to the case of **Montgomery v. State,** 231 Ala. 1. Also **Vincent v. State,** 16 Ala. App. 546. Here our Supreme Court declared this Act unconstitutional and void. The outstanding reason was that the court, under our Constitution, was without power to extend executive clemency. However, long before the above decision was handed down, this office had held time and again that the courts were without power to suspend sentence for costs. **Biennial Report of Attorney General,** 1932-34, page 256. But we see no reason for dwelling at length on this since in the case of **Montgomery v. State,** supra, the court held that such suspension for any purpose was unconstitutional except where it related to additional punishment fixed by the court. This is provided for by Section 5284, Code of Alabama of 1923. However, if such sentences were suspended and the court at the time the law was declared unconstitutional had lost all power over same or refused to exercise its power by properly sentencing the defendant, then in this event, my answer to each of your questions is as follows:

I note in your request numbered 1, you say there was no mention of costs. I am presuming this means there was no judgment for costs. If I am

right in this presumption, then the costs in these cases cannot go against the Fine and Forfeiture Fund of your county for the reason there can be no execution issued for costs and if none can be issued there can be no return and therefore this cost cannot go against the Fine and Forfeiture Fund of your county. Under Section 4039, Code of Alabama, 1923, as amended by an Act approved February 18, 1927, (General Acts, 1927, page 45), there must be an execution returned against the defendant "no property found."

In answering your second request, I note you say the defendant was ordered to pay all costs. If there was a judgment for costs following what appears to be the judge's bench notes and execution was issued against the defendant on such judgment and returned "no property found", then under Section 4039, supra, the costs would be a charge against the Fine and Forfeiture Fund of your county. (Quarterly Report of Attorney General, Vol. 10, page 54.)

The answer to your third request also depends on whether or not there is a judgment for costs; if so, then on return of execution against the defendant "no property found" the cost, that is, the costs of the sheriff and clerk would be a charge against the Fine and Forfeiture Fund of your county. If no mention was made of witness fees and there is no judgment for same, then for the reason set out in my answer to your first request, this cost could not be a charge against the Fine and Forfeiture Fund of your county. Costs and expenses of witnesses are paid from the Fine and Forfeiture Fund of your county under the provisions of Section 4039, as amended by General Acts, 1927, page 45, and is as follows:

"1. That Section 4039 of the Code of 1923 be, and hereby is, amended so as to read as follows to-wit: Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the State witnesses, the County Treasurer of such county must pay the fees of the officers of the Court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found', or in cases in which the State enters a nolle prosequi, or where the indictment has been withdrawn and filed, or the prosecution abated by the death of the defendant, unless the payment or distribution of such funds are otherwise provided for. This section shall be held to apply to all fees of officers of the trial court arising on an appeal by the defendant to the Supreme Court or the Court of Appeals, in cases where the judgment of the trial court is reversed and a new trial allowed, or the defendant ordered discharged. It shall also apply in appealed cases, where the defendant has appealed from a conviction and sentenced to the State penitentiary, and the conviction is affirmed, to such part of the fees of the officers of the trial court, arising on the appeal, as are not paid from the convict fund under Sections 3667 and 3668 of the Code, an execution for such unpaid part of such fees having first been issued against the defendant and returned 'no property found.' It shall further apply to the fees of the officers of the trial court, arising on an appeal, in cases where the defendant has appealed from a conviction, the punishment fixed being otherwise than imprisonment in the State penitentiary, and the judgment of the trial court is affirmed, provided the defendant be first proved insolvent by the return of the execution 'no property found.'

"2. Should any part of this Act be declared unconstitutional, such decision shall not affect the remaining parts thereof; but, on the contrary, the same shall remain of full force and effect.

"3. Provided that no fees of a Circuit Solicitor or trial tax whether heretofore accrued or hereafter accruing, shall be taxed against or paid out of the fine and forfeiture funds of any county.

"Approved February 18, 1927."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 31, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

1. Where the court declares the bond after indictment set by the committing magistrate is insufficient and changes the bond, the defendant should be rearrested and placed under new bond as set by the court or remanded to jail.

2. There is no authority of law for withdrawing and filing of an indictment unless the return of the sheriff shows that a writ of arrest has been issued for two terms and returned "not found."

3. Where the defendant who has been indicted is present in court at the time the order is made for the withdrawal and filing of an indictment, such an order is without authority of law.

4. Clerk of Circuit Court entitled to usual fees where an indictment is withdrawn and filed even though the court was in error in so ordering.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 1, 1939, in which you request my opinion as follows:

"Please refer to the following:

" 'Circuit Court of ..... County.
State of Alabama
vs. Set for 6/15/34, 11/6/34, 2/8/34
Offense Grand Larceny

'Indictment 4-13-34 on Bond from Preliminary in amount $100.00.

'Upon return of indictment, bond set by Circuit Judge at $500.00. No record of capias being issued.

'Orders of Court

June 15/34 Taken out of Call

Nov. 6/34 Passed

Feb. 8/35 On Motion of State Solicitor, Indictment Withdrawn and Filed.'

"and advise me as follows:

"1. When the Court declared the bond insufficient, should a Writ of Arrest be issued by the Clerk?

"2. Can an indictment be withdrawn and filed in the absence of the issue and return of a Writ of Arrest for two terms 'Not Found'?

"3. The Minutes of the Court in this case read as follows:

" 'This day in open Court came the State of Alabama by its Solicitor and the Defendant in his own proper person and upon motion of the State Solicitor; it is ordered and adjudged by the Court that this case be and is hereby withdrawn and filed.' If such minute entry is correct, can an indictment be withdrawn and filed when the Defendant is in Court?

"4. If your answer to questions No. 2 and No. 3, is in the negative, what is the duty of an Examiner of Accounts, examining such Court, when such condition prevails?

"5. Would the fees of the Clerk, including final record, the fees of the Sheriff and the fees of Witnesses, be a legal charge against the Fine and Forfeiture Fund of the County under such conditions?"

Answering your first inquiry, it is my opinion that if the defendant is out on bond, which bond was set at a preliminary hearing before a magistrate and afterwards the defendant was indicted for the offense for which he was held to the grand jury and the court, as provided by Section 3364, Code of Alabama, 1923, after the return of the indictments, sets the defendant's bond as $500.00 instead of $100.00 as set by the committing magistrate, there should be a capias issued and the defendant arrested and placed under new bond, as set by the Judge, and on the defendant's failing to make such bond, he should be remanded to jail.

My answer to your second question is in the negative. I call your attention to Section 4548, Code of Alabama, 1923, which is as follows:

"4548. Withdrawal and filing of indictment or affidavit.—In all criminal cases in the circuit court, in which a capias or warrant of arrest has issued for two terms, and has been returned 'not found,' the solicitor

may, by leave of the court, withdraw and file the indictment, with leave to reinstate the same when the ends of justice require such reinstatement."

Biennial Report of the Attorney General 1934-36, page 51.

You will note from the above quoted section that first there must be an indictment in the Circuit Court. Second, a writ of arrest or capias must have been returned "not found" for two terms before the solicitor is authorized by leave of the court to withdraw and file the indictment.

In my opinion, even though the order of the Court directing the clerk to withdraw and file the indictment was erroneous, the clerk is entitled to the usual fees in such cases.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. G. C. Brittain, Secretary,
Board of Revenue,
Calhoun County,
Anniston, Alabama.

Counties—County governing body and not sheriff is charged with the duty of providing adequate janitor service for jail, and sheriff has no authority to employ a janitor for the jail and bind the county for the payment of such janitor's salary. However, the county governing body may reimburse the sheriff for the amount of the salary paid to the person employed by him as janitor for the jail under Section 186 of the Code of Alabama, 1923, even though claim for reimbursement is not presented within twelve months.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 28, 1939, as follows:

"Mr. P. W. Cotton, ex-sheriff of this county, during his term of office on, to wit, December 16th, 1938, filed with the Board of Revenue of Calhoun County, a claim of which a copy is hereto attached, the original claim of course, was duly sworn to as provided.

"As Treasurer of Calhoun County, and as Secretary of the Board of Revenue, I submit to you the following in reference to said claim:

"1st. The Board of Revenue, not having paid the Sheriff for janitor service for the jail, and not having provided a janitor for the jail, is desirous of reimbursing the sheriff in such amount as it can legally do.

"2nd. Can the Board of Revenue legally pay this bill, or any part of the bill?

"3rd. Especially can the Board of Revenue pay any amount preceding twelve months before the filing of this claim, or is such claim as would be barred if not filed within twelve months after the accrual of the claim, or any part of the same?"

Section 4866 of the Code of Alabama, 1923, provides:

"4866. Janitor service and bathing facilities.—The court of county commissioners, board of revenue, or city council, shall provide adequate janitor service for, and shall enforce cleanliness in their respective jails; shall provide bathing facilities separate for negroes and whites, males and females, soap and towels, hot and cold water, clean and sufficient bedding, with clean clothes when the prisoners are not able to provide them."

This office in an opinion to Hon. Howard D. Lynes, Sheriff, Washington County, Chatom, Alabama, under date of February 21, 1938, (Quarterly Report of Attorney General, Vol. X, p. 102) after citing the provisions of the above-quoted code section, held that the sheriff was not invested with authority to appoint a janitor for the jail. Under the express terms of this code section, the county governing body itself is charged with the duty of providing adequate janitor service for the jail.

Since the sheriff has no legal authority to employ a janitor for the jail, he cannot, by employing such a janitor, bind the county to pay his salary, even though the county governing body has not provided adequate janitor service for the jail as required of it by Section 4866, supra, nor could the janitor so employed enforce a claim for his salary against the county. Likewise, if the sheriff has paid the salary of the janitor so employed, he could not enforce a claim for reimbursement of the amount so paid against it. Cf. **Escambia County v. Dixie Chemical Products Co.**, 156 So. 631.

However, if the county governing body failed to provide adequate janitor service for the jail and the sheriff employed a janitor for the jail and paid him for his services, he has advanced money in good faith for the benefit of the county, and the county governing body may, if it so desires, reimburse him for the amount so paid under the authority vested in it under the provisions of Section 186 of the Code of Alabama, 1923. This section provides as follows:

"186. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, To reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, To refund to any person, firm or corporation, money, or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying

on road improvement, tick eradication, or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the county was without authority to pay such claims on account of a defect in any law or any other reason."

Cf. Opinion of the Attorney General to Hon. Percy M. Pitts, Member, House of Representatives, Chilton County, Clanton, Alabama, under date of February 17, 1939, a copy of which is hereto attached for your information.

The fact that the claim for reimbursement is not presented within the time required by Section 228 of the Code of Alabama, 1923, (twelve months) does not affect the authority of the county governing body to pay the same under Section 186, supra. Cf. Opinions of the Attorney General to Hon. Frank Pearce, Tax Assessor, Marion County, Hamilton, Alabama, under date of February 27, 1939, and to Hon. George Pegram, Attorney for Board of Revenue, Marengo County, Linden, Alabama, under date of February 27, 1939, copies of which are herewith enclosed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Sentence—Under indictment for grand larceny, a sentence to hard labor for twelve months is a proper sentence.

Costs—(a) Execution for costs should issue against a defendant sentenced to hard labor for the county when there is a judgment therefor.

Opinion by Assistant Attorney General Mitchell.

Dear Sir:

I have your letter of February 1, 1939, in which you request my opinion as follows:

"Please refer to the following:
" 'Circuit Court .....County
State of Alabama Set for 4-23-34
vs. Offense Grand Larceny

..... In Jail from Preliminary
Orders of Court

4-17-34 Deft. arraigned, plead not guilty, trial set for 4-23-34.

4-23-34 Jury and verdict of guilty.

4-23-34 Judgment of guilty and sentenced to Hard Labor for the county for one year and deft. gives notice of appeal, without suspension of sentence.

Appealed.

Affirmed 11-20-34'

"and advise me as follows:

"1. Is the sentence to Hard Labor the proper sentence in such a case?

"2. Can execution for costs legally issue in such a case?

"3. If execution cannot legally issue would the fees of officers and witnesses be a legal claim against the Fine and Forfeiture Fund?

"4. If the answer to question No. 1 is in the negative, what is the duty of an Examiner of Accounts, examining such Court, when such a condition prevails?"

You enclose with the above request for opinion a transcript of the judgment entry which is in part as follows:

"* * * thereupon in open court on this day in the presence of the State Solicitor, defendant's attorney and defendant came a jury of good and lawful men to-wit: E. M. Malone, and eleven others, who, having been duly empanneled and sworn according to law, who, having heard the evidence and the charge of the court upon their oaths in open court on this day in the presence of the State Solicitor, defendant's attorney and defendant do say 'We the jury find the defendant guilty as charged in the indictment—The jury recommends the mercy of the court.'

"Thereupon in open court on this day the defendant being asked by the court if he had anything to say why the judgment and sentence of the law should not be passed upon him replied 'He had not'; It is therefore considered and adjudged by the court that the defendant is guilty of the offense of grand larceny as charged in the indictment and that the State of Alabama for the use of Mobile County have and recover of the Defendant the costs of this prosecution and that the defendant perform hard labor for the County of Mobile, Alabama, for the term of one year."

Replying to question Number 1, a defendant under indictment for grand larceny may be sentenced to hard labor for the county for twelve months. It is true that Section 4905 of the Code, fixes the punishment for grand larceny to a term in the penitentiary of not less than one nor more than ten years. It is also true that the indeterminate sentence laws (Acts 1919, p. 148) were intended to apply to sentences imposed under Section 4905, supra, but inasmuch as Section 4905 provides for a sentence of one year the courts have held that when the court imposes a sentence of one year such a sentence must be governed by Section 5265 of the Code, which reads in part as follows:

"* * * in all cases in which the imprisonment or sentence to hard labor is twelve months or less, party **must** be sentenced to imprisonment in the county jail or to hard labor for the county." (Emphasis supplied)

In the case of **Rogers v. State,** 17 Ala. App. 175, the court in declaring erroneous a sentence to the penitentiary for a term of from one to ten years said:

"The court, however, fell into error in fixing the minimum at one year in the penitentiary. Under Section 7620, Code of 1907, if for one or less, it must be to hard labor for the county."

(Section 7620, Code of 1907 brought down as Section 5265, Code of 1923).

Your attention is also called to the Editor's footnote to Section 4462 of the Code, which follows:

"In view of the long line of decisions holding that when a person is convicted of first degree manslaughter and sentenced to one year imprisonment the imprisonment must be in the county and not in the penitentiary as prescribed by this section—Section 5265 taking precedence over this section—it seems strange that this inconsistency should be allowed to remain on the statute books through so many codifications, when the only result is confusion and lack of harmony in the law."

Answering your second question, execution for costs should issue against the defendant, there being a valid judgment therefor. The Judgment is irregular in that it does not comply with the provisions of Section 5291, Code of 1923, and the case would have, on appeal, been remanded for proper sentence, but failure to set out the amount of costs and number of days defendant must serve to pay them is not such irregularity as to vitiate the judgment for costs.

Evans v. State, 109 Ala. 11.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Motor vehicles—License tags—

1. Act providing for purchase of license tags for motor vehicles completely junked, totally destroyed by fire, or totally wrecked held constitutional (General Acts, 1936, p. 71).

2. Owner of the completely junked motor bus entitled to purchase license tags from State Tax Commission on payment of fifty cents.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 25, 1939, in which you request my opinion as follows:

"In re our telephone conversation yesterday I am writing for an opinion in regard to schedule 158.16½, extra session 1936, page 71, which schedule provides for transfer of old license or issuance of new license for the sum of 50c when a motor vehicle has been wrecked or junked.

"I am enclosing letter this day received from Attorney representing Southeastern Greyhound Lines, which explains in detail their reason for requesting new tags for their junked buses.

"Please advise me if this company can legally make application for new set of tags for their junked buses in view of ruling of Supreme Court in a case holding constitutional an amendment to the Revenue Act of 1935, which amendment is almost identical as far as form is concerned with the Act of 1936, schedule 158.16½ above referred to.

"I will appreciate an opinion before April 1st if possible as this company expects to replace their junked buses April 1st with new buses."

In a former opinion of this office (Quarterly Report of Attorney General, Vol. IV, p. 44), following the reasoning of the Supreme Court of Alabama, as we interpreted the same, in the cases of **Ferguson v. Court of County Commissioners of Jackson County,** 187 Ala. 645, 65 So. 1028, and **Tuscaloosa Bridge Company v. Armistead,** 41 Ala. 9, this office held Act No. 105 approved April 10, 1936, (General Acts 1936, p. 71), referred to in your inquiry, unconstitutional as violative of Section 45 of the Constitution. In the recently decided **case of Nachman v. State Tax Commission,** 233 Ala. 628, 173 So. 25, the Supreme Court of Alabama considered directly the question of the applicability of Section 45 of the Constitution of 1901 to an act amending the same revenue law by adding schedules to a particular section of said revenue law.

In the Nachman case the title of the act under consideration was:

"An Act to amend an Act entitled 'An Act to provide for the general revenue of the State of Alabama, approved July 10, 1935' by adding Schedule 155.4(a) and Schedule 155.4(b) to Section 348 of said Act."

Speaking to the question of whether or not such an attempted amendment offended Section 45 of the Constitution, the court said:

"The act purports to amend the General Revenue Law of the State, approved July 10, 1935, by adding two additional schedules—sources of income—to section 348 of said revenue law. Section 348, covering more

than a hundred pages of the printed act, contains many separately numbered schedules of license tax, covering and including many different subjects of taxation and license.

* * *

"It would have been quite sufficient had the title of the act in question simply read : 'An Act to amend an Act entitled "An Act to provide for the general revenue of the State of Alabama, approved July 10, 1935," without mentioning any particular section or provision of the act intended to be amended. However, even if it be conceded that the title of the amendatory act gave notice only of an intention to confine the operation of the amendment to section 348, and of a legislative purpose to deal only with subjects germane and cognate to that section, the result would be the same, for the provisions of the amendatory act, as above pointed out, are germane and cognate to the subject dealt with in section 348 of the original statute. This being true, the amendatory act is not offensive in this respect, to the provisions of section 45 of the Constitution. Dunning v. Holcombe, 203 Ala. 546, 84 So. 740; Lee v. State, 227 Ala. 2, 150 So. 164; McCoy v. Jefferson County, 232 Ala. 651, 169 So. 304; Tyler v. State, 207 Ala. 129, 92 So. 478; Mayor, etc., of Ensley v. Cohn, 149 Ala. 316, 42 So. 827; Ex parte Cowart, 92 Ala. 94, 99, 9 So. 225.

* * *

"The amendatory act discloses its purpose to create new sources of revenue, and being complete and intelligible within itself, and capable of being understood without reference to the original section sought to be amended, there was no occasion or necessity to re-enact or publish at length the section as amended. Ex parte Pollard, 40 Ala. 77; City Council of Montgomery v. Birdsong, 126 Ala. 632, 28 So. 522; Tyler v. State, 207 Ala. 129, 92 So. 478; State ex rel. Terry v. Lanier, 197 Ala. 1, 72 So. 320; State v. Rogers, 107 Ala. 444, 19 So. 909, 32 L. R. A. 520. There is, therefore, no merit in this contention of appellants."

In view of this decision of the Supreme Court of Alabama, the former opinion of this office is overruled and withdrawn.

Act No. 105 (General Acts, 1936, p. 71) is as follows:

"To amend Schedule 158 of Chapter 6, Article 13 of 'An Act to provide for the general revenue of the State of Alabama,' approved July 10, 1935.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That there be added to Schedule 158, Chapter 6, Article 13 of 'An Act to provide for the general revenue of the State of Alabama' approved July 10, 1935 a schedule numbered 158.16½ which shall read as follows:

"Section 2. Schedule 158.16½. In case a motor vehicle, passenger car, motor bus or motor truck shall be either totally destroyed by fire or totally wrecked, or completely junked, the owner of said vehicle shall

have the right to purchase another set of motor vehicle license tags from the State Tax Commission in return for the payment of Fifty Cents (50c) for said burned or wrecked motor vehicle. In the event said motor vehicle shall have been wrecked, but not destroyed by fire, said owner must notify within three days both the Probate Judge of his County and the State Tax Commission in Montgomery that he is transferring his tags to his new motor vehicle and furnish the Probate Judge with both his license tag numbers and his motor and serial numbers.

"Section 3. Schedule 158.16½ shall go into effect immediately upon its passage by both houses of the Legislature and its approval by the Governor.

"Approved April 10, 1936."

In the light of the decision in the Nachman case, supra, it is my opinion that this act does not violate Section 45 or any other section of the Constitution. Act No. 105 being constitutional, the Southeastern Greyhound Company may legally make application for a new set of tags for their junked buses provided, of course, that there is strict compliance with the provisions of the act.

The mere fact that the added schedule states that the owner of a vehicle destroyed by fire or totally wrecked or completely junked shall have the right to purchase another set of motor vehicle license tags from the State Tax Commission in return for the payment of fifty cents "for said burned or wrecked motor vehicle" without including "motor vehicles completely junked" does not, in my opinion, affect the right of the owner of a motor vehicle which has been complete junked to purchase such tags. The words "completely junked vehicle" must, in my opinion, be read into said schedule to give it the effect obviously intended by the lawmakers. **City of Birmingham v. Southern Express Co.**, 164 Ala. 529.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. Howard Kirby,
Clerk of the Circuit Court,
Etowah County,
Gadsden, Alabama.

1. Costs—Whenever costs are collected in any case which are not sufficient to pay all of the costs of the case, the costs must be prorated among all entitled to participate in the costs, and the Act of the Legislature approved September 24, 1923, General Acts 1923, page 259, does not make the costs of the clerk and sheriff preferred above all other costs in the case.

2. A municipality is liable for trial tax in all cases not especially exempt.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 20, 1939, in which you request my opinion as follows:

"Please render me your opinion on Act No. 252, page No. 259 in Acts of Alabama (General) 1923.

"Herewith I submit an example of problem I have in mind: The total amount of costs in a certain case is $35.50, the Sheriff's cost being $7.50, the Clerk's cost being $5.10 and the amount of $10.00 is all that is collected or can be collected on the cost, then would I not be following the law in Section stated above if I prorated between the Sheriff and Clerk in proportion to the amount due Sheriff and Clerk, in other words distribute to Sheriff and Clerk the proper per cent of amount collected since enough was not collected to pay Sheriff and Clerk in full?

"I woud also appreciate your opinion on the following: In appeal cases from Police Court of the City should I tax in costs State Trial Tax. that is against the City when cases are dismissed by the City?

"The State examiner is checking my records and I would highly appreciate a prompt ruling on the above stated matters."

I note that you say the costs in the case were $35.50, that you have collected $10.00 of these costs and that you will not be able to collect any more. You desire to know how this is to be prorated between the sheriff and the clerk.

I know of no law that permits the sheriff and the clerk to appropriate this $10.00 to the payment of their costs. I am supposing that there is some witness cost, trial tax, etc., connected with this case. If I am right, then this amount should be prorated among all who are entitled to costs whether it be the sheriff, the clerk, the witnesses or trial tax, and this should be done according to the ratio it will pay on the whole cost. I do not think the purpose of the Act approved September 24, 1923, General Acts 1923, page 259, was to make the fees of the sheriff and clerk preferred as against all other costs. The Act itself does not provide that the sheriff's and clerk's fees are preferred, but starts out with the idea that they are already preferred, which is not correct. Therefore, the opinion of this office written August 21, 1937, to Hon. Chas. W. Lee, State Comptroller, is incorrect in holding that the Act approved September 24, 1923, General Acts 1923, page 250, makes fees of clerk and sheriff a preferred claim above all other costs of the case, and to that extent it is hereby overruled.

Answering your last inquiry as to trial tax on cases filed by a city in the circuit court or brought to such court by appeal, I call your attention to an opinion of this office written to Hon. J. W. Brock, Clerk and Register, Circuit Court, Coffee County, Enterprise, Alabama, Vol. VIII, Quarterly Report of Attorney General, page 190. I think this opinion answers your question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Dr. A. F. Harman, President,
Alabama College,
Montevallo, Alabama

Schools—Alabama College—

Board of Trustees authorized to invest funds of the Dancy Endowment and Leventritt Endowment in bonds issued by Alabama College to the United States of America or bonds of the State of Alabama, provided that the interest on said bonds is used in accordance with the terms of the endowments, and the amounts paid for the bonds upon maturity are restored to the said endowment funds.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 19, 1939, in which you request my opinion as follows:

"At a meeting of the Board of Trustees of Alabama College held in the Governor's office in Montgomery, November 28, 1938, the following resolution was adopted:

"Be it resolved by the Board of Trustees of Alabama College that the President of Alabama College with the advice and consent of the Executive Committee be and he is hereby authorized to purchase from the United States of America, or other holders, bonds issued by Alabama College to the United States of America in conformity with the offer of the United States of America to Alabama College hereinabove accepted; or, to purchase bonds of the State of Alabama.

"Be it further resolved that such purchases can and shall be made only from endowment funds in possession of the College; that the returns from the interest on the said bonds shall be devoted to the purposes for which any or all such endowments have been made to the College; and that the bonds shall be taken up by the College at maturity and the amounts paid therefor restored to the said endowment funds.

"Be it resolved further, that the purchase of bonds authorized in this resolution shall be subject to the approval of the Attorney General of Alabama as to the legality of the procedure.

"We will thank you to advise us at the earliest possible opportunity as to whether or not the College in accordance with the foregoing resolution has the authority to purchase the bonds as contemplated."

Subsequently, in response to our request for additional information in regard to the endowment funds referred to in your letter, you advised us that you had reference to the Dancy endowment of $12,500.00 and the Leventritt Endowment of $2,500.00. From information furnished us by you, it ap-

pears that the Dancy Endowment was made to the Departments of English, Literature and Expression of the Alabama College, the principal of which was to be invested and held by the trustees of the College as an endowment fund and the revenue, income, dividend or yield from which, annually, was to be used and devoted by the trustees to the use, benefit and maintenance of the schools or departments of English, Literature and Expression of Alabama College; and the Leventritt Endowment was made to Alabama College, the principal of which was to be held in trust, and the income from which was to be applied to aid a deserving scholar of the college, said deserving scholar to be a graduate from a high school in the Birmingham district, to be selected by the Superintendent of Schools of the City of Birmingham, the scholarship thus created to be known as the M. V. Joseph scholarship.

Section 501 of the Alabama School Code of 1927 provides, in pertinent part:

"The Alabama College shall be governed by a Board of Trustees * * *."

Under the broad general powers given to the Board of Trustees of Alabama College by the above-quoted provision of our statutory law, it is my opinion that the Board may invest the funds of either or both of these endowments in bonds issued by Alabama College to the United States of America or in bonds of the State of Alabama, if the Board of Trustees deems such an investment to be wise and beneficial to the interest of the college and the purposes for which the endowments were made, provided that the income from the bonds in which such funds are invested is used exclusively in accordance with the terms of said endowments, and the moneys so invested are restored at maturity of the bonds to the endowment funds to which they belong.

The premises considered, we advise you that the procedure in regard to the purchase of bonds with the moneys in these two endowments authorized in the resolution which you set out in your inquiry is legal and that the Board of Trustees has the authority to act pursuant to said resolution.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. B. F. Singleton,
State Comptroller,
Capitol.

Costs and Fees—

In a proceeding to abate a nuisance under Sections 4671-4682, Code of 1923, an order of trial court taxing cost of certain witnesses against the State was a sufficient compliance with Section 4862, Code of 1923, to authorize payment of said witnesses out of Fine and Forfeiture Fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 13, 1939, in which you request my opinion as follows:

> "Herewith attached you will please find a decree of the Circuit Court of Marion County, Alabama, in the case of The State of Alabama, by K. V. Pite, as deputy solicitor, Vs. Harlan Lewis, No. 1406, in the Circuit Court in Equity for said State and County.
>
> "You will note that there is attached to the decree, a summary statement itemizing the witness certificates, aggregating the sum of $42.35 and for which the Court has rendered its decree, etc.
>
> "In that this is an unusual case and one in which we are not often called upon for payment, we shall appreciate your advising us as to the legality of the claim and the liability of the State in connection therewith."

I am of the opinion that the witness fees, above referred to, are payable out of the Fine and Forfeiture Fund of Marion County.

The main case in this instance, as shown by the attached decree, was a proceeding in equity to abate a liquor nuisance under Sections 4671-4682, Code of 1923. The contempt proceedings, as shown by said decree, were collateral merely and did not affect the matter of costs.

The decree relative to the costs provided as follows:

> "1. That the motion of the defendant to retax a portion of the Court costs in this case be, and the same is, granted, and that the witness fees claimed by the State's witnesses, viz, (names of witnesses), the total of such fees for said above named witnesses being $42.35, be paid by the Complainant, State of Alabama, * * *"

Section 4682, Code of 1923, provides for taxing costs in cases like the one under consideration. Said section provides in pertinent part as follows:

> "* * * and the costs in such injunction case, unless charged against some party defendant by the court and collected from him, shall be paid as in criminal cases in which the State fails, **upon the court making an order to that effect.**" (Emphasis ours)

In my opinion, the court's decree taxing the witness costs of $42.35 against the State, was a sufficient compliance with this section to authorize the payment of these witness fees out of the Fine and Forfeiture Fund of the county. The decree taxed the witness fees in question against the State.

That part of Section 4682, "upon the court making an order to that effect," in my judgment, means that the court tax the costs in question

against the State. I do not think it necessary that the court specifically order that the costs in question be paid as in criminal cases in which the State fails.

Costs in criminal cases in which the State fails are payable out of the Fine and Forfeiture fund of a county. I refer you to Section 4039, Code of 1923, as amended by Acts 1927, page 45, which deals with officers' fees, and Sections 3763 and 3769, Code of 1923, which deal with witness fees.

The case under consideration was a proceeding in equity, and the court could apportion the costs. See **Sections 6655 and 7221, Code of 1923; Bynum Brothers v. State**, 216 Ala. 102.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. B. F. Singleton,
State Comptroller,
Capitol.

1. Where defendant is sentenced to the penitentiary and before be is turned over to the Convict Department the Governor paroles him on good behavior, without mentioning costs, then such costs are payable out of the Fine and Forfeiture Fund of the County under Section 4039, Code of Alabama, 1928 (Michie).

2. When a defendant is convicted of a criminal offense and before he is turned over to the Convict Department he is paroled by the Governor on payment of costs, such defendant should not be released until the costs are paid. However, if he is, then on return of execution "no property found" against the defendant, these costs may come out of the Fine and Forfeiture Fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 16, 1939, in which you request my opinion as follows:

"In connection with the provisions of House Bill No. 91, page 42, General Acts of 1935, will you please advise me in answer to the following questions:

"1. A defendant is convicted, appeals and the appeal is affirmed, and before the defendant is sent to Convict Department he secures from the Governor parole reading as follows: 'Paroled pending good behavior

under H. B. 91.' Can execution be issued for the costs and then officers collect fees from the Fine and Forfeiture Fund? If no execution can be issued, how are costs paid?

"2. A defendant is convicted, appeals and the appeal is affirmed, and before the defendant is sent to the Convict Department, he secures from the Governor a parole reading as follows: 'Paroled on good behavior under H. B. 91, on payment of costs.' If the defendant does not pay the costs, can execution be issued for the costs and then officers collect fees from Fine and Forfeiture Fund? If no execution can be issued, how are the costs paid?"

My answer to your first inquiry is in the affirmative. Provided, however, at the time the defendant was convicted there was a judgment for costs. The fact the defendant was paroled before he was delivered to the Convict Department makes no difference. This cost is payable under the following provision of Section 4039, Code of Alabama, 1928 (Michie):

"* * * or in which defendants have been convicted, and have been proven insolvent by the return of execution 'no property found.'"

As to your second inquiry, if the Governor's order of parole reads as you have it above, namely, "paroled on good behavior under House Bill 91 on the payment of costs," the defendant should not have been released from the penitentiary until he had paid the costs. You will note from the above that he was paroled contingent on such payment. However, if he was released before he paid it, and there is a judgment for costs against him, then under Section 4039, Code of Alabama 1928 (Michie), supra, if execution for costs is issued and returned "no property found," then the costs would go against the Fine and Forfeiture Fund.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. C. E. McNatt, Clerk,
Circuit Court, Franklin County,
Russellville, Alabama.

Clerk is not entitled to compensation for writing post cards to witnesses, notifying them not to attend trial of case, when so requested to do so by the Judge of the Court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 15, 1939, in which you request my opinion as follows:

"Joe Doe has a misdemeanor case against him in the Law & Equity Court. By order of the court his case is set for trial on the trial docket for a certain day at the next regular term of court. The clerk issued subpoenas for three state witnesses and the sheriff serves the subpoenas on the three state witnesses. About three days before the day of trial for said case, the trial judge tells the clerk to notify the three state witnesses to not come to court as witnesses in that case because the case is going to be Nol Prossed. The clerk then mails notices written on post cards to each witness telling the witnesses to not appear in court as a witness in the case on the date shown by the subpoena. Is the clerk entitled to pay for issuing and mailing the notices to the state witnesses to not appear as witnesses in the case on trial day?

"Richard Roe has a misdemeanor case against him in the Law & Equity Court. By order of the court, his case is set for trial a certain day in the future. The clerk issues subpoenas to all state witnesses specifying the day of trial in the subpoenas and the sheriff serves the subpoenas on the witnesses. Thereafter, the judge tells the clerk that the defendant is going to plead guilty trial day and to notify the witnesses to not come to court trial day. The clerk mails a post card to each state witness notifying them to not appear in court as witnesses in that case. Is the clerk entitled to any compensation for notifying the witnesses to not appear as witnesses in that case?

"John Smith has a misdemeanor criminal case against him in the Law & Equity Court and the case is set for trial for a certain day. Subpoenas are issued for the state witnesses by the clerk and served by the sheriff. Before the trial day, the defendant, John Smith, appears before the court and pleads guilty in the case and pays a fine and is discharged by the court. The clerk then issues and mails notices to each state witness telling them to not appear as witnesses on the trial day as the case has already been settled. Is the clerk entitled to any pay for issuing and mailing the notices to the state witnesses?

"If the clerk is entitled to compensation for issuing and mailing notices to state witnesses as set out above, how and out of what fund may he collect this compensation?

"Would the clerk be entitled to compensation for issuing and mailing notices to defendant witnesses telling them not to come to court in the above cases?"

My answer to your first three questions is in the negative for the reason that there is no provision of law for paying the clerk for writing post cards to witnesses notifying them that they do not have to attend court. This is a mere courtesy which the clerk is extending to the judge of the court.

The answer to your first three questions dispenses with the necessity of answering the fourth question.

My answer to your fifth inquiry is in the negative for the reason given above.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. William Varner,
Judge of Probate,
Macon County,
Tuskegee, Alabama.

Licenses—

1. If person engages in the business of selling soft drinks at wholesale to retailers for resale by transporting same from place to place in a county other than the county wherein his bottling plant is located, he is liable for an annual state license of $20.00 and a county license of $5.00 for each county in which he so engages in business, as a transient dealer, notwithstanding the fact that he has paid the bottling license levied by Schedule 26 of Section 348 of the 1935 Revenue Act.

2. When application is made, within the statutory period, to the Judge of Probate for a refund of licenses erroneously paid, the Judge of Probate should grant the applicant a certificate showing him entitled to a refund for only the amount of the licenses so erroneously paid by him, regardless of the amount for which the applicant seeks refund.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your request for official opinion, together with enclosures, dated January 27, 1939, as follows:

"Enclosed is petition and attached letter asking for certificate as shown therein. Please advise me if I should make the certificate as requested.

"Under Schedule 147 at page 292 of Simon's Code, it is expressly stated: 'Provided that transient dealers of bakery products and soft drinks engaging in the business of transient dealers in any other county, shall pay the State an annual state license of $20.00 and in addition thereto five dollars to each county in which such transient dealer does business as such.'

"I know of no reason why transient dealers of **soft drinks** or **bakery products** should not pay this license and until otherwise advised by you, so rule."

The petition and certificate enclosed with your request are as follows:

"Honorable William Varner, Judge of Probate of Macon County, Alabama:

"Comes Opelika Coca Cola Bottling Company, and shows:

"1. In October, 1938, it paid to the Judge of Probate of Macon County, Alabama, $35.50 and received therefor Occupation License No. 119, under Schedule 147 of Section 348 of the General Revenue Law of 1935, as amended, the said sum of $35.50 being made up of the following items:

Transient Dealer State License	$30.00
Transient Dealer County License	5.00
Judge of Probate's fee	.50
	$35.50

"2. In October, 1938, it paid to the Judge of Probate of Lee County, Alabama, under Schedule 25 of the aforesaid Revenue Law, the sum of $600.50, and obtained therefor License No. 345 as a Bottler, and said sum of $600.50 was made up of the following items:

State Bottler's License	$400.00
County Bottler's License	200.00
Judge of Probate's fee	.50
	$600.50

"3. That it is a corporation that was organized in Lee County, Alabama, several years ago, and its home office is and always has been in Opelika, in Lee County, Alabama; that it is engaged in, and continuously for the past several years has been engaged in, the business of bottling and distributing in bottles, Coca-Cola, and in the business of selling, at wholesale, Coca-Cola which is a non-alcoholic soft drink.

"That its Bottling Plant is in Opelika, Lee County, Alabama, but it now engages in, and for some years past has engaged in, the business of selling at wholesale its non-alcoholic soft drink, Coca-Cola, in Macon County, Alabama; it does not have, and has never had any bottling plant in Macon County, Alabama. Its activities in Macon County are now, and have been that of selling at wholesale from its trucks traveling from its plant in Opelika, Alabama, to Macon County, Alabama, its non-alcoholic soft drink, Coca-Cola.

"4. By virtue of Schedule 129 of Section 348 of aforesaid Revenue Law of 1935, and the payment in Lee County, Alabama, of the license tax required by the aforesaid Schedule 25, it was not liable for, and was exempt from, the payment of any County or State license in Macon County, Alabama, as a transient vendor or dealer, and the aforesaid State and County license paid to the Judge of Probate of Macon County, Alabama, in October, 1938, was not due by Opelika Coca-Cola Bottling Company, and was paid through mistake.

"And Opelika Coca-Cola Bottling Company is entitled to have refunded to it under the provisions of Section 366 of the aforesaid Revenue Law, the amount of the State and County license paid to the Judge of Probate of Macon County, Alabama, in October, 1938, less the commission thereon retained by the Judge of Probate.

"There is submitted herewith the certificate of the Judge of Probate of Lee County, Alabama, showing payment of the Bottler's license as hereinabove averred.

"Wherefore, Opelika Coco-Cola Bottling Company prays that your Honor will proceed to ascertain the amount due it under the provisions of the aforesaid Section 366 of the aforesaid Revenue Law, and grant to it such certificate as will enable the State Comptroller and the Court of County Commissioners of Macon County, Alabama, or other governing body of said County, to draw their respective orders or warrants to effect a due refund to the undersigned.

OPELIKA COCA-COLA BOTTLING COMPANY,
By G. C. Roberts, Jr.,
President and Treasurer.

"The State of Alabama,
Lee County.

"Before me, Louise Hall, a Notary Public in and for said County in said State, personally appeared G. C. Roberts, who being duly sworn says that he is President and Treasurer of Opelika Coca-Cola Bottling Company, a corporation; that he has personal knowledge of the matters stated in the foregoing petition, and that they are true; and that he is authorized to make this affidavit.

G. C. Roberts, Jr.

"Subscribed and sworn to before me this 24th day of January, 1939.

Louise Hall,
Notary Public, Lee County, Ala.

"The State of Alabama,
Lee County.

"I, John T. Frazer, Judge of Probate of Lee County, Ala., hereby certify that in October, 1938, Opelika Coca-Cola Bottling Co., a corporation, paid to me, as Judge of Probate, for Bottling License under Schedule 25 of Section 348 of General Revenue Laws of 1935, as amended, the amount of $600.50, made up of these items: State License, $400.00; County License $200.00, Judge of Probate's fee, .50, and that thereupon there was issued to Opelika Coca-Cola Bottling Co. License No. 345 for the operation of a Bottling Plant in Opelika, Ala. In witness whereof I have hereunto set my hand and affixed the seal of the Probate Court of Lee County, Alabama, on this 24 day of January, 1939.

John T. Frazer,
Judge of Probate, Lee County, Ala."

"The State of Alabama, }
Macon County. }

"Opelika Coca-Cola Bottling Company, a corporation, has presented to the undersigned as Judge of Probate of Macon County, Alabama, its petition, pursuant to Section 366 of the General Revenue Law of 1935, as amended, for a refund of certain license tax as specifically described in said petition, and a true copy of the petition presented is hereunto annexed and made part of this certificate.

"Acting under and pursuant to Section 367 of the General Revenue Act of 1935, as amended, I have determined that the money paid to me in October, 1938, by Opelika Coca-Cola Bottling Company for transient bottler's license was not due to be paid by it, and was paid through mistake, and that it is entitled to refund, and I have determined and ascertained the amount due Opelika Coca-Cola Bottling Company, by way of refund, under the provisions of said Section 366, and do hereby certify that the amount so ascertained by me as due to be refunded is $..... being the amount of the State and County license, less the commissions thereon retained by me as Judge of Probate, and that of the total amount to be refunded that part which should be refunded by the State of Alabama is $....., and that part which should be refunded by Macon County, Alabama, is $.....

"And this certificate is made, in duplicate, pursuant to and in obedience to Section 367 of the General Revenue Law of 1935, as amended, to enable the State Comptroller and the governor body of Macon County, Alabama, to draw their warrants or orders, respectively.

"In witness whereof I have hereunto, and to the duplicate hereof, set my hand and affixed the seal of said Court on this ..... day of January, 1939.

.....
Judge of Pobate."

You request that we advise you if you should make the certificate as requested. We advise you that you should make a certificate showing that the applicant is entitled to a refund from the State of Alabama of $10.00 only and that you should not make a certificate to the effect that he is entitled to a refund of $30.00 from the State or to any amount whatsoever from Macon County, since he is not entitled to a refund of any part of the license or licenses for which he seeks a refund except $10.00 from the State.

Proved averments of the petition for refund show that the applicant has paid in Lee County, Alabama, the county in which his bottling plant is located, the license levied by Schedule 26 of Section 348 of the 1935 Revenue Act, on persons engaged in producing, bottling and/or distributing in bottles or other closed containers soda water, coca cola, etc.

It is true that the last sentence of Schedule 129 of Section 348 of the 1935 Revenue Act, which is the schedule levying license on persons engaged in the business of selling at wholesale non-alcoholic, carbonated or other soft drinks, reads:

"Provided that bottlers who have taken out bottle license for operating plants in this State shall not be liable under this Schedule, nor shall such bottlers be liable for any county or state license under Schedule 146 hereof nor as transient vendors or dealers or peddlers."

This certainly seems to evince a legislative intent to require bottlers to pay only the license levied by Schedule 26, supra, even though such a person might also sell such drinks, which he bottles, at wholesale to retailers for resale by transporting same from place to place in the county in which his bottling plant is located and in other counties in the State, and to exempt such person who has paid the bottler's license levied by Schedule 26, supra,

from the payment of any license levied by any other schedule of the 1935 Revenue Act for disposing of the drinks so bottled by him in any manner for which a license might be levied. Undoubtedly, if there were not other provisions of the same act which very clearly show a contrary legislative intent to require a bottler to pay a transient dealer's license if he disposes of his products at wholesale to retailers for resale by transporting the same from place to place in a county other than the county wherein his bottling plant is located, he would not have to pay a license for so disposing of his products because of the above-quoted part of Schedule 129. It should be here noted that the particular subject dealt with in Schedule 129 from which the quoted excerpt is taken is the business of selling such bottled drinks at wholesale, regardless of the manner in which the same is made.

However, Schedule 147 of Section 348 of the same act levies a license upon a person engaging in the business of a transient dealer, a general license of $30.00 to the state, and a county license of $5.00 for each county in which he so engages in business.

There is no question before us as to whether or not the person (here the Opelika Coca-Cola Bottling Company) making the application for refund was engaged in the business of a transient dealer, as that term is defined by Schedule 147, supra. The contention made is that the company is exempt from the payment of the license levied on a person engaged in the business of a transient dealer, even though it does so engage in business, because of the above-quoted provision from Schedule 129.

Subsection (k) of Schedule 147, supra, which is the schedule levying a transient dealer's license, provides in pertinent part:

> "(k) Provided this schedule shall not apply to * * * (2) nor shall this schedule apply to transient dealers of bottled soft drinks in the county where such bottling plant is located when sold or distributed from a bottling plant which has paid the privilege tax imposed by this act under Schedule 26; (3) * * * Provided that transient dealers of * * * soft drinks engaging in the business of transient dealers in any other county, shall pay the state an annual license of $20.00 and in addition thereto $5.00 to each county in which such transient does business as such."

By this proviso, the Legislature has specifically dealt with the subject of what license, if any, a person who is a bottler of soft drinks and who has paid the bottler's license levied by Schedule 26 should pay if he sells such soft drinks in such a manner as to be engaged in the business of a transient dealer. It has seen fit to exempt such a person from the payment of a transient dealer's license altogether in the county in which his bottling plant is located, and has seen fit to prescribe a different transient dealer's license for such person so engaged in the business of a transient dealer in all other counties from the general transient dealer's license, i. e., $20.00 for the State, and $5.00 for each county in which he so engages in business, rather than $30.00 for the state, and $5.00 for each county.

It is a well known rule of statutory construction that a statute should be construed as a whole and that it should be construed so as to avoid a conflict and to give effect of each of the provisions of the statute if that can be done without doing violence to the letter of any of the provisions. See cases collated in 18 Alabama Digest, page 125, "Statutes", Key No. 206. However,

it is an equally well known rule of statutory construction that the less certain terms of a statute must yield to the more certain terms hereof to harmonize seeming conflicts therein. **Marengo County v. Wilcox,** 215 Ala. 640. When this is done, the above-quoted provisions from Subsection (k) of Schedule 146 of the 1935 Revenue Act, being more certain on this subject, must control over the less certain provisions of the quoted excerpt from Schedule 129 thereof, and it inevitably follows that a bottler of soft drinks, even though he has paid the bottler's license levied by Schedule 26, supra, must pay the special transient dealer's license of $20.00 for the state, and $5.00 for each county, other than the county in which his bottling plant is located, in which he sells his bottled soft drinks in such a manner as to make him engaged in the business of a transient dealer.

In arriving at this conclusion, we are not unmindful of the well known principle of law that taxing statutes are strictly construed against the taxing power. **State v. Roden Coal Co.,** 197 Ala. 407. But it is an equally well established principle of law that statutes affording exemptions from taxation and against the person claiming the exemption. Such provisions must be construed strictissimi juris. An exemption claim not clearly within the import of the statute must be rejected. **State v. Wright,** 224 Ala. 357.

That is was the intention of the Legislature that this rule should be applied as to claims for exemption from licenses and taxes levied by the 1935 Revenue Act is, in my judgment, shown by the provisions of Sections 356, 357 and 368½ thereof, which read respectively as follows:

> "Section 356. Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by a law on each branch of the business."

> "Section 357. Wherever in this Act two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor."

> "Section 368½. The exceptions and exemptions from license or privilege taxes levied by this Act which are granted by this Act, are hereby declared to be exclusive, and any laws or parts of laws general, local or special, granting or attempting to grant any exceptions or exemptions, except as specifically granted herein are specifically repealed."

Since the person who has made a claim for refund to you has paid $30.00 to the state and $5.00 to the county when he should have paid $20.00 to the state and $5.00 to the county, as hereinabove pointed out, then, since he has made his application to you in accordance with the provisions of Section 366 of the 1935 Revenue Act, you should, as Judge of Probate, in accordance with the provisions of Section 367 of said act, grant him a certificate showing that he is entitled to a refund from the state of the $10.00 which he has so overpaid on his state license. Likewise, you should not honor his claim for refund of the other portion of the amount which he paid for state license and his claim for the amount which he paid for county license, since those amounts were properly collected from him, that being the amount of state and county license which he should have paid for selling soft drinks in your

county, a county other than the county in which the bottling plant is located, in such a manner as to be engaged in the business of a transient dealer.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. William E. Persons,
Director, Department of
Corrections & Institutions,
Capitol.

Convict Department—

1. Deductions from sentence under Section 5131, Code of 1923, held not to include time imposed as part of a sentence for the payment of fine and costs.

2. Fine and costs may be remitted by the Governor upon proper order under the provisions of the General Acts of 1935, p. 43.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 13, 1939, in which you request my opinion as follows:

"Re: Deduction from term of punishment for good conduct. Section 5131.

"Under the above quoted statute this Department in the past, has not allowed any deduction on hard labor sentences on that part of the sentence for fine and costs. Please advise us if this procedure is within the meaning of the law."

In reply, I wish to advise you that in my opinion the procedure followed by your Department in computing the time allowed under Section 5131 of the Code of Alabama, 1923 and as outlined in your request, is within the meaning of the law referred to. This section appeared in the Code of 1907 as Section 7514 and provides as follows:

"7514. Deduction from term of punishment for good conduct.—Whenever the inspectors of convicts shall report to the governor that the conduct of any convict in the penitentiary, or at hard labor for the county, has been good during any year or years of his imprisonment, the governor may, in his discretion, order a portion of the sentence of such

convict to be deducted for each year of good conduct as follows: From each of the first two years, two months, from each of the next two years, three months; from each of the next two years, four months; from each of the next two years, five months, and from each remaining year after eight years, six months. When the sentence is for less than two years, and not less than six months, such good behavior entitles the convict to a pro rata deduction of the time allowed for the first two years, but no deductions shall be granted in any case where the sentence is for less than six months. But the provisions of this section do not apply to any convict who, after having served a sentence, or a portion of a sentence, either in the penitentiary or at hard labor for the county, has been convicted of a felony, or of a misdemeanor involving moral turpitude; nor to any convict who escapes or attempts to escape."

You will note that the Code of 1923, Section 5131 is identical to the above cited provisions of Section 7514 of the Code of 1907.

Under date of September 15, 1920 in the Biennial Report of the opinions of the Attorney General of 1918-20, page 671, this office construed this Section to mean that no "short time" allowance could be allowed on hard labor sentences for costs.

Concerning the deduction from the fine, I wish to advise that in my judgment the sentence to hard labor in payment of the fine and the sentence to hard labor for payment of the costs are entirely separate from the sentence to hard labor for additional punishment. The remittance of the fine by the Governor cannot affect the sentence for costs or the additional sentence for hard labor as additional punishment. In an old case, which I do not find to have been overruled or modified in any way, the court held: "After rendition of the judgment in the present case, the Governor, under the great seal of the State, there being no restrictions upon his powers so to do, by any rule or regulation of law, remitted, the entire fine, which destroyed the validity of the judgment, except as to the costs. The court, therefore, on the motion of appellant, should have vacated the judgment, as to the fine but left it valid and subsisting as to the costs." **Chisholm v. State,** 42 Ala. 527.

In my judgment, the sentence of a convict for a definite period of time to pay a fine, with a definite period of time to pay the costs and a hard labor sentence as additional punishment, are divisible for purposes of your department in computing the time served by the convict, when making recommendations to the Governor as provided for by Section 5131, supra. In my judgment, this Section applies only to hard labor sentences imposed as additional punishment upon the convict.

The costs are debts due to the officers who performed the services in the case. (See Dane v. Loomis, 51 Ala. 488, where the court said: "Costs due to officers and witnesses are simply debts—the compensation which they receive for services and duties they perform.") These can only be remitted by proper order of the Governor, under authority of the General Acts of 1935, page 43, which provide as follows:

"Section 1. The Governor may, after conviction, and not otherwise, grant a pardon or parole to any person convicted of a misdemeanor. The Governor, in his discretion, may grant the pardon or parole with or without the payment of the court costs in the case and either with or

without a formal application being made therefor; and either with or without notice of intention to apply for pardon or parole being given as is now provided by law.

"Section II. In all misdemeanor cases where parole has heretofore been granted conditioned upon the payment of court costs, or where temporary parole has been granted, the Governor may, in his discretion, give a pardon or permanent parole either with or without the payment of the court costs. Where parole or pardon is granted to a person who has heretofore been granted a parole conditioned upon payment of court costs or a temporary parole and is not in the penitentiary no clothes shall be furnished him nor money paid to him, as provided by Sections 3650 and 3651 of the Code of Alabama of 1923."

Without the above quoted provisions of the General Acts of 1935, there exists no provision for the remittance of costs. Section 5131 supra, confers upon the Governor no broader power than that given by Section 5127, Code of 1923, which provides as follows:

"5127. Power of governor to pardon; entry and attestation of pardons.—In all cases, except treason and impeachment, the governor has power, after conviction, and not otherwise to grant reprieves, commutations, paroles and pardons, and to remit fines and forfeitures and he must cause to be entered, in a book kept for that purpose, his reasons therefor, and must preserve on file all documents on which he acted; and it is the duty of the secretary of state to attest the reprieve, commutation, or pardon, when granted."

This office has held heretofore that Section 5127, supra, does not give the Governor the right to remit costs. See, Biennial Report Attorney General 1918-20, page 671. See also State v. Richardson 18 Ala. 109, wherein it is held that a release by the Governor from imprisonment alone is not a release from a fine.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. R. K. Greene,
Judge of Probate,
Hale County,
Greensboro, Alabama.

Licenses—Rolling Stores—A person who transports a general line of merchandise and/or groceries on a motor vehicle from place to place and sells, or offers to sell, the same from said vehicle is operating a rolling store, even though he does not permit prospective purchasers to enter the vehicle for the purpose of inspecting merchandise and has the body on the vehicle so constructed that the merchandise is not displayed to the public.

(a) Such person not entitled to purchase license at the rate provided for by Subsection (b) of Schedule 146 of Section 348 of the 1935 Revenue Act as amended by Act No. 230, (General Acts, 1936-37, page 277), approved March 2, 1937, but required to purchase license at the rate provided in Subsection (c) of said schedule as amended.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 9, 1939, in which you request my opinion as follows:

"Mr. J. C. Findlay of Moundville, Alabama, operates a store at Moundville, which is kept open during all business hours. He also pays all licenses required to operate this store. Mr. Findlay also has two delivery trucks which travel through the northern part of Hale County delivering goods. Mr. Findlay admits that sales are made from these trucks but purchasers are not admitted into the trucks for the purpose of inspecting merchandise. He has paid $30.00 for license under Section B of Schedule 146. He has also paid all license due for selling cigarettes and gun shells.

"Mr. Findlay is now cited by a Mr. Terrel from the State License Department, who claims that Mr. Findlay comes under Section C of Schedule 146 and that under this Section he should pay $100.00 for the first truck and $130.00 for the second truck as licenses.

"I am unable to interpret this law as there appear to be conflicts in the various Sections defining Transient Vendors.

"I would appreciate an early opinion from you as to whether Mr. Findlay should pay the additional license."

Schedule 146 of Section 348 of the 1935 Revenue Act, as originally enacted, did not contain the provisions of Subsection (b) of the present schedule. These provisions were incorporated in the schedule for the first time by Act No. 230 (General Acts 1936-37, p. 277) approved March 2, 1937, and read as follows:

"Each itinerant vendor or peddler of merchandise, other than tobacco products, medicines or household remedies, who operate on foot or use a vehicle solely for the purpose of transporting merchandise from house to house or place to place but who do not use such vehicle for the display of merchandise or as a rolling store and who do not permit purchasers to enter said vehicle for the purpose of purchasing merchandise, shall pay an annual license of Twenty Dollars ($20.00) to the State and Ten Dollars ($10.00) to the county in each county in which they do business. This sub-section shall not apply to sales by a licensed merchant in the county in which his store is located."

Evidently the intention of the Legislature in incorporating these provisions in the schedule were (1) to license itinerant vendors or peddlers of merchandise, other than tobacco products, medicines, or household remedies,

who operated on foot, since the original schedule did not levy any license whatever on persons engaged in business in that manner and (2) to make it possible for such persons who use a vehicle solely for the purpose of transporting merchandise from house to house or place to place, but not for the purpose of selling merchandise therefrom, to do so upon the payment of the license therein provided for rather than the much higher license which they had previously had to pay under the original schedule.

In my opinion, such a person who uses a vehicle for the purpose of displaying merchandise, or who permits purchasers to enter his vehicle for the purpose of purchasing merchandise, or as a rolling store does not come under the provisions of Subsection (b), supra, but must pay the license levied by Subsection (c) of said schedule, which reads as follows:

> "Each person using a motor vehicle, doing business as a transient vendor or peddler as defined in this Schedule displaying, selling or offering to sell any goods, wares or merchandise of whatever nature, at retail shall pay to the State in order to engage in such business the following licenses: Upon one (1) motor vehicle, the annual license for each such motor vehicle, not in excess of one, so used, of—$100.00. Upon two motor vehicles, or more, but not to exceed three, the annual license fee of each such additional motor vehicles shall be—$130.00. Upon more than three motor vehicles, but not to exceed six, the annual license fee for each such additional motor vehicle shall be—$150.00. Upon each motor vehicle in excess of six, for each such additional motor vehicle $200.00. In addition to the above, there is levied a license of—$50.00 for the State and a county license of $50.00 in each additional county in which said business is conducted. Rolling stores which are controlled or held with others by stock ownership of 25% or ultimately controlled or directed by one management or association of ultimate management, shall be deemed for the purpose of this Schedule as being owned by the same person."

Under the facts given in your request for opinion, the party therein referred to does not use the vehicles in question for the purpose of displaying merchandise and does not permit purchasers to enter said vehicle for the purpose of purchasing merchandise. Therefore, we must determine whether or not the vehicles which he uses are rolling stores. If they are not, then he is not required to pay any license whatever, either under the provisions of Subsection (b) or the provisions of Subsection (c) of Schedule 146, because of the last sentence of Subsection (b) which reads as follows:

> "This subsection shall not apply to sales by a licensed merchant in the county in which his store is located."

If he uses the vehicles in question as a rolling store, then he must pay the license under Subsection (c) of said schedule.

Under the facts stated by you and from other information before us, he not only uses these trucks for the delivery of merchandise or groceries which have been purchased at his store in Moundville but has them stocked with a general line of merchandise and/or groceries which he transports from house to house or place to place and sells from said vehicles.

The statutes of this state have never defined the term "rolling store." Nor have the courts of this state ever defined the term. Therefore, we must

look to the commonly understood meaning of the term and the definitions from other jurisdictions to determine the sense in which that term is used in our licensing statutes.

In 54 C. J. 1102, we find this statement:

> "Rolling Store. By statute, a store or a truck or motor vehicle carrying stock of groceries, or other goods and selling the same to the public."

Under the note to that statement is cited the case of **Erwin v. Omaha,** 118 Neb. 331, 224 N. W. 692, 693, and the following excerpt from the opinion of the court in said case:

> "It is a miniature store, stocked with all kinds of merchandise usually carried in a grocery store, placed on an automobile truck, so that the store can be moved from house to house, and the merchandise sold therefrom the same as it would be sold from a store at a fixed location. The vehicle in question is about 16 feet long by six feet wide and has an aisle down the center for the use of the customers. The scheme of the business is to give purchasers cash and carry prices at their doors."

While the particular vehicle referred to in that case had an aisle down the center for the use of the customers, we do not think that having the vehicle equipped so that the merchandise may be displayed or the customers may enter the vehicle to make purchases are necessary elements for a rolling store. If the vehicle is stocked with a general line of merchandise and/or groceries that are transported from house to house and place to place and the merchandise is sold therefrom in such a manner as to give purchasers cash and carry prices at their doors, we think it is a rolling store within the meaning of our statutes although it is not so equipped that the merchandise and/or groceries are displayed or so that persons may enter the same to make purchases. Though the person doing business in that manner must bring an article to the front or rear of the vehicle for the prospective purchaser to examine and the purchase is made at the front or rear and on the outside of the vehicle instead of on the inside, the effect is to still give to purchasers cash and carry prices on a general line of merchandise and/or groceries at their doors. This is in accord with the commonly understood meaning of the term "rolling store" in this state.

In the case of **Johnston v. State,** 78 So. 419, where the question under consideration was whether or not a person doing business in a particular manner was subject to payment of the license then prescribed in our statutes for peddlers, Judge Samford for the court made the following statement:

> "The law abhors dodgers and will not tolerate subterfuges."

The same rule is expressed in these words by the Justices of the Supreme Court of Alabama in **In Re Opinions of the Justices,** 225 Ala. 503:

> "That which is prohibited directly cannot be done indirectly and the law abhors evasions and subterfuges."

Admittedly, if the vehicles mentioned in your letter of inquiry which are stocked with a general line of merchandise and/or groceries were so equipped that the merchandise and/or groceries were displayed for purchasers or persons could enter same to make purchases, then the operator of the vehicles would be subject to the license provided in Subsection (c) of Schedule 146, supra. The effect of his doing business in the manner in which he is doing it is the same as if his vehicle was so equipped that the merchandise and/or groceries were displayed or persons could enter same to make purchases. To hold that he was not operating a rolling store because the merchandise and/or groceries were not displayed or persons were not allowed to enter the vehicle to make purchases would be to sanction an evasion of our revenue statutes and to permit a person to dodge the payment of the proper license prescribed for the business in which he is engaging. This, I cannot do.

The premises considered, I advise you that the vehicles described in your inquiry are being operated as rolling stores and, therefore, do not come within the provisions of Subsection (b) of Schedule 146, supra, but rather come within the provisions of Subsection (c) of said schedule and the operator of the same should be required to pay the license provided in said Subsection (c).

This holding is in accordance with the intention of the Legislature in incorporating the provisions of Subsection (b) in Schedule 146 and the intention of the Legislature in enacting a statute, when ascertained, is the law itself. **City of Birmingham v. Southern Express Co.,** 164 Ala. 529.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1939.

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

1. In counties having a fine and forfeiture fund into which witness fees in criminal cases are paid by the Clerk of the Circuit Court, he is not entitled to a five percent commission on such witness fees under Subsection 16 of Section 6724 of the Code of Alabama.

2. In counties in which, by local act, the fine and forfeiture fund has been abolished or merged with the general fund and witness fees in criminal cases are collected by the Clerk of the Circuit Court and paid into the general fund, he is entitled to five percent commission on such witness fees under Subsection 16 of Section 6724 of the Code.

3. All claims against county must be itemized, sworn to and presented to the Board of Revenue within twelve months, except where a special law provides a different mode for dealing with such

claims and when the law itself determines the fact and the amount of the claim.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion, under date of March 18, 1939, which is as follows:

"I am enclosing herewith copy of a letter I have just received from Hon. J. Henry Megginson, Circuit Clerk. Also attached to the letter is a bill against Clarke County for $128.77 for five percent on witness fees paid by said Circuit Court Clerk into the County Treasury from February 5, 1935, to June 15, 1938, both inclusive. Until Honorable A. A. Carmichael, Attorney General, rendered an opinion on June 14, 1938, construing subsection 16 of Section 6724 of the Code of Alabama of 1923 the Clerk had not retained the five percent of witness fees paid into the County Treasury. The question before me is this:

"Is the Circuit Clerk entitled to the five percent fees he failed to deduct when he paid monies into the County Treasury from February 5, 1935 to June 15, 1938? A list of the payments is also hereto attached.

"A prompt reply will be appreciated as we want your opinion in deciding whether or not the county is liable."

In your statement of facts it is not clear to what fund the clerk paid the witness fees which were collected by him from February 5, 1935, to June 14, 1938. You state that they were paid by him to the "County Treasury." They may have gone to the general fund or, on the other hand, they may have been paid into the fine and forfeiture fund.

Under the rulings of this office, there appears to be a distinct difference in cases where the clerk pays witness fees into the fine and forfeiture fund and in cases where the clerk pays the witness fees into the general fund because of a local law abolishing or merging the fine and forfeiture fund.

In counties which still have their fine and forfeiture fund into which all money collected by the clerk as fines, forfeitures, and witness fees goes, the clerk is only entitled to the five percent commission on the fines and forfeitures. In Biennial Report of Attorney General, 1926-1928, page 158, we find this statement:

"It is my opinion, and you are so advised, that subsection 16 of Section 6724 confines the five percent commission to **fines** and **forfeitures** and that, therefore, you could not legally charge this commission on funds coming into your hands under the operation of Section 3670."

You are further referred to the following opinions of this office: Biennial Report of Attorney General, 1928-1930, page 990; Office Edition of Attorney General, Vol. IV, page 221. A study of these opinions indicates that a clerk in such counties, i. e., counties having a fine and forfeiture fund, is entitled to five percent commission on **fines** and **forfeitures only** and not on witness

fees. This reasoning is based on the theory that the witness fees collected is money for the witness and not money for the county.

In counties which have no fine and forfeiture fund, that is, counties in which by local act the fine and forfeiture fund has been abolished or merged with the general fund, it seems the clerk is not only entitled to five percent commission on the fines and forfeitures but that he is also entitled to five percent commission on the witness fes in criminal cases. In Quarterly Report of Attorney General, Vol. XI, page 103, we find this statement:

> "Montgomery County witness fees are not paid out of the fine and forfeiture fund but are now paid out of the general fund of the county. The witness fees collected by the clerk are now paid into the general fund of the county instead of the fine and forfeiture fund. The witnesses are paid irrespective of the witness fees collected by the clerk. Although I admit that the witness fees collected by the clerk are paid into the general fund of the county to reimburse the county for witness fees paid out of said fund, nevertheless it is my opinion that the witness fees collected by the clerk are funds collected for the county and not for the individual witness so as to come within the purview of Subsection 16 of Section 6724 of the 1923 Code of Alabama, and, therefore, the clerk is entitled to his commission of five percent on witness fees collected and paid into the general fund of Montgomery County."

You are further referred to Office Edition of the Attorney General, Vol. IV, page 384.

These opinions seem to indicate that the clerk is entitled to five percent commission on **both** the fines and forfeitures collected and **also** on witness fees. This reasoning is based upon the theory that the witness fees collected is money collected for the county and not for the individual witness.

Assuming that your fine and forefiture fund has not been abolished or merged and that the clerk paid the money collected as witness fees into the fine and forfeiture fund, then it is my opinion that he is **not** entitled to the five percent commission on said money under authority of Subsection 16 of Section 6724 of the Code.

Assuming that your fine and forfeiture fund has been abolished or merged and that the clerk paid the money which he collected as witness fees into the general fund, then I am of the opinion that he is entitled to his five percent commission on such money under authority of Subsection 16 of Section 6724.

I am not unmindful of the fact that Sections 225 and 228 of the 1923 Code provide that all claims against the county must be itemized, sworn to, and presented to the Board within twelve months. It is my judgment that **this** claim is of that type that is not required to be itemized and presented to the Board of Revenue for audit and allowance.

In the case of **Briggs v. Coleman,** 51 Ala. 561, it was held that a witness' certificate in a criminal case was not a claim against the county that had to be itemized and presented to the Board of Revenue for audit and allowance.

Also in the case of **State ex rel Holcombe v. Stone,** 157 So. 454, 229 Ala. 357, it was held that a certificate of the trial judge of fees allowed officer attending condemnation proceeding need not be itemized, sworn to, and presented to the Board of Revenue for audit and allowance.

Also in the case of **Board of Revenue of Montgomery County v. Southern Bell Telephone & Telegraph Co.,** 76 So. 858, 200 Ala. 532, it was held that the certificate of the judge of probate for payment of franchise tax erroneously paid need not be presented to the Board of Revenue for audit and allowance.

We find in the case of **State ex rel City of Mobile vs. Board of Revenue of Mobile County,** 61 So. 851, 180 Ala. 514, that there are two exceptions to the rule of law requiring claims to be itemized, sworn to, and to be presented to the Boards of Revenue within twelve months for audit and allowance. The two exceptions referred to appear in the following language of the Court:

> "Where special laws in express terms or by necessary implication provide for a different mode of dealing with such claims, that mode is, of course, followed, though in derogation of the general statutes and policy of the state. And, again, where the law itself determines the fact and the amount of the claim, leaving nothing to be ascertained or determined by the county board, it is generally held that presentment for audit, and allowance or rejection is not contemplated nor required."

The facts in your inquiry were not sufficiently clear as to enable me to answer your question directly. However, I have pointed out the law as it applies to two different types of county set-ups. From this, and under the facts in your county, you will be able to determine the law that should be applied in answer to your inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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